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In The
Supreme Court of The United States

LAWRENCE E. LEVIN AND CAROLYN R. LEVIN,
Petitioners,

v.

PERRY A. MARCH,
Respondent.

Petition For A Writ Of Certiorari To The United States Court of Appeals For The Sixth Circuit

PETITION FOR A WRIT OF CERTIORARI
with Appendix

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QUESTION PRESENTED

Whether respondents to a summary judgment motion are entitled pursuant to the plain language of Rule 56(c) of the federal rules of civil procedure and the Celotex decision of this Court to conduct discovery relevant to that motion, notwithstanding the trial court's determination to deal with the action in an expeditious manner. In other words, whether a treaty such as the Hague Convention, codified in 42 U.S.C. §11601, *et. seq.*, shall deny a litigant the right to conduct discovery before the entry of a judgment.

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IN THE SUPREME COURT OF THE UNITED STATES

LAWRENCE E. LEVINE and CAROLYN R. LEVINE, PETITIONERS

v.

PERRY MARCH

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

Lawrence and Carolyn Levine (the "Levines") respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*) is reported at 249 F.3d 462 (6th Cir. 2001). The opinion of the district court entered October 3, 2000 (App. B, *infra*) is reported at 136 F. Supp.2d 831 (M.D. Tenn. 2000). The

order of the Court of Appeals denying the Petition for Rehearing (App. C, *infra*) was filed on July 9, 2001, and is unreported but can be found at 2001 U.S. App. LEXIS 16100.

Jurisdiction

The judgment of the Court of Appeals was entered on April 19, 2001. The petition for rehearing filed by the Petitioners herein was denied on July 9, 2001. (App. C, *infra*). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

Statutory Provisions Involved

The relevant provisions of 42 U.S.C. §11601, et. seq. (the International Child Abduction Remedies Act, or "ICARA") are reproduced at App. D, *infra*. The relevant provisions of The Hague Convention on the Civil Aspects of International Child Abduction (the "Hague Convention") are reproduced at App. E, *infra*.

Statement

This case concerns the denial by the district court and the affirmation by the court of appeals, in derogation of the mandates of this Court as set forth in Celotex Corp. v. Catrett, 477 U.S. 317, 91 L.Ed. 2d 265, 106 S. Ct. 2548 (1986), of a request by the Levines for discovery or an evidentiary hearing prior to the granting of a summary judgment motion filed by Perry March ("Mr. March"). The court of appeals held, in what it conceded was a "matter of first impression," that the Levines were not entitled to

discovery or an evidentiary hearing because of the "unique nature" of the Hague Convention.

The essential facts of this case are as follows. On August 3, 2000, Mr. March filed a Complaint under ICARA for the return of Samson and Tzipora to Mexico after the Levines obtained temporary custody of the children in the Juvenile Court for Davidson County, Tennessee. The Levines answered the Complaint in the shortened period of time ordered by the district court and raised certain affirmative defenses under articles 13 and 20 of the Hague Convention. Mr. March then filed a motion for summary judgment on August 30, 2000. This motion was accompanied by declarations under oath made by Mr. March and several other individuals whose testimony was later cited by the trial court in its decision, as well as supplemental declarations under oath by Mr. March and others, and a verified emergency motion under oath by Mr. March.

The district court entered an order on September 1, 2000, *two days after March had filed his motion for summary judgment*, which specifically held that the court would rule on the motion for summary judgment *prior to allowing any discovery to take place*. Another order entered by the district court gave the Levines a total of 13 days to respond to the summary judgment motion. Mr. March continued to file additional affidavits and declarations under oath during this 13 day period. These additional affidavits and declarations were also cited, in part, by the district court in its decision.

Notwithstanding the September 1, 2000 order of the district court, the Levines filed a motion seeking discovery under Rule 56(f) of the Federal Rules of Civil Procedure in order to properly respond to the motion for summary judgment filed by Mr. March. The district court refused to permit such discovery and denied the motion in its order entered October 3, 2000 granting Mr. March's motion for summary judgment.

The record reflects that the district court had decided almost before the Levines had received a copy of March's summary judgment motion that the Levines would have less than two weeks to reply to March's motion for summary judgment and would not be permitted *any* discovery on the facts on which the motion was based, much less facts necessary to support their affirmative defenses. Instead, the parties engaged in what can charitably be described as a battle of affidavits.

There is no question that the district court and the court of appeals relied upon the declarations and affidavits Mr. March filed in granting and upholding the motion for summary judgment. For example, the district court accepted without allowing further inquiry Mr. March's assertion that Mr. March's legal problems in Mexico were caused by "agents of the Levines." The district court also weighed the credibility of certain witnesses based solely on the declarations and affidavits.

As a further example, the court of appeals accepted Mr. March's contention that the wrongful death judgment[1] against him for the death of Janet March ("Janet"), the mother of the children and the daughter of the Levines, was entered "as a discovery sanction" against Mr. March at a time that "his finances and necessity of caring for his children did not allow him to travel to Nashville, Tennessee, for [a] deposition." The court of appeals also accepted Mr. March's claims that the Levines never proffered evidence of their allegations against him in the state court proceedings. Because they were denied an opportunity for discovery, the Levines were unable to investigate Mr. March's claim that this judgment of $113,500,000 for wrongful death in favor of the Levines and the children, obtained as a result of a three day jury trial, was a "discovery sanction."

In this case, a crucial issue to the Levines was whether Mr. March had killed Janet. Janet disappeared under suspicious circumstances from her home in 1996 and has not been found. The Levines contended that Mr. March killed Janet and that returning the children to Mr. March's care in Mexico, among other things, would subject the

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[1]The Levines obtained a judgment against Mr. March in a wrongful death action in the Seventh Circuit Court for Davidson County, Tennessee. This judgment held that "Janet March is dead. Her death was caused by the specific peril of abuse and wrongful killing by Perry March." Mr. March has appealed from this judgment.

children to an "intolerable situation," which, if proven, could provide an exception to the return of children under the Hague Convention and ICARA. Mr. March insisted in his filings in the district court that he did not kill Janet and that there is no competent, admissible evidence that he killed Janet, or even that Janet is dead. (Mr. March's insistence that there is no competent proof that Janet is dead is curious in light of his remarriage *based on her death*, a matter on which the Levines also sought discovery.) The district court permitted no discovery on these claims and issues prior to entering summary judgment returning the children to his care, and the court of appeals upheld this refusal to permit discovery.

The Levines' demands for discovery, found both in their motion for discovery and in their response to Mr. March's motion for summary judgment, focused on issues in substantial dispute in this case. Their Rule 56(f) motion, for example, sought discovery on a great number of issues relevant to Mr. March's claims that the children were "habitually resident" in Mexico, and in particular whether the children's presence in Mexico had a "settled purpose" as required by cases interpreting the Hague Convention. The Levines also sought discovery on facts related to their claim that the children were in grave risk of harm if returned to Mexico. The district court denied this request for discovery and ultimately ruled that the children were not in grave risk of harm and that they were habitually resident in Mexico, relying in large part on Mr. March's declarations and affidavits and the declarations and affidavits of other witnesses proffered by Mr. March.

In addition to their Rule 56(f) motion, in their verified response to March's Motion for Summary Judgment, the Levines stated that "[t]he affirmative defenses involving the issues of whether there is a grave risk of physical or psychological harm to the Children if they are returned to Mexico, or whether their return would place them in an intolerable situation, *are particularly in need of further discovery*." Further, the Levines stated that

> Without going into any further detail, it is clear that March's communications with the Children, his persistent failure to abide by valid court orders, and his other conduct, raise substantial questions about the danger of physical or psychological harm to the Children or to the Levines in the event the Children are returned to Mexico, and as to whether the Children would be placed in an intolerable situation there. *The Court cannot grant summary judgment on March's Petition without further investigating these issues in a hearing or hearings on the Levines' affirmative defenses.*

Response to motion for summary judgment filed by the Levines (emphasis supplied). No such discovery or hearing took place.

Reasons for Granting the Petition

This Court should review the decision of the court of appeals for two reasons: (1) the denial of the right to discovery prior to the entry of summary judgment against the party requesting discovery conflicts with relevant

decisions of this Court and is also contrary to generally applicable law of the Sixth Circuit; and (2) the determination of the court of appeals to carve out an exception for Hague cases to the general right of discovery in summary judgment actions is misguided and decides an important question of federal law that has not been, but should be, settled by this Court.

The refusal of the lower courts to permit discovery on Mr. March's summary judgment motion left the Levines without *any* vehicle with which to investigate the most significant issues in this case. Per Rule 56(c) of the Federal Rules of Civil Procedure, a district court cannot refuse discovery before weighing the evidence in deciding whether to grant a motion for summary judgment, regardless of whether the court is addressing a tort issue, as in Celotex, or an issue involving a treaty, as here.

In Celotex, this Court held without equivocation that,

> [I]n our view, the plain language of Rule 56(c) mandates the entry of summary judgment, *after adequate time for discovery* and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial.

477 U.S. at 322 (emphasis supplied). *See also* Lujan v. National Wildlife Federation, 497 U.S. 871, 884 (1990), citing Celotex and using the identical language.

The Sixth Circuit, prior to the decision in this case, had adopted this view with vigor. For example, in Vance ex rel. Hammons v. United States, 90 F.3d 1145, 1149 (6th Cir. 1996) the Sixth Circuit held that "the general rule is that summary judgment is *improper* if the non-movant is not afforded a sufficient opportunity for discovery," and that

> *if the non-movant makes a proper and timely showing of a need for discovery, the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion.*

90 F.3d at 1149 (emphasis supplied), *citing* White's Landing Fisheries, Inc. v. Buchholzer, 29 F.3d 229, 231-232 (6th Cir. 1994). In Buchholzer, the Sixth Circuit held that "a grant of summary judgment *is improper if the non-movant is given an insufficient opportunity for discovery.*" Buchholzer at 231-232 (emphasis supplied). *See* also Chapman v. Higbee Co., 256 F.3d 416, 419 (6th Cir. 2001), a case decided by the Sixth Circuit less than three months after this one, in which the court noted that "*After adequate time for discovery* and upon motion, Rule 56(c) mandates summary judgment against a party who fails 'to establish the existence of an element essential to that party's case and on which that party bears the burden of proof at trial.'" Id., *citing* Celotex.

The court of appeals acknowledged that the Levines filed a motion for additional discovery as required by the Sixth Circuit's own case law. The court of appeals also acknowledged that the district court had ruled within days after the filing of Mr. March's summary judgment motion

that discovery *would not be permitted prior to the decision on the motion.* The court erroneously accepted March's argument that the Levines' motion for discovery (filed by the Levines in the face of the district court's order that such discovery would not be permitted) related only to the habitual residence questions. This is simply mistaken, but even if accurate, the Levines were entitled to discovery on the issue of the children's habitual residence since it was a key element of Mr. March's case. The court of appeals instead decided that, because of the fast track nature of Hague cases, it was not wrong for a trial court to deny discovery to the non-moving party in a summary judgment action.

The Levines assert that it makes no difference whether a case involves a unique treaty or a unique statute: *the requirements of Rule 56(c) apply to all federal litigation.* A court of appeals is not free to pick and choose which types of action will permit discovery prior to ruling on summary judgment motions and which will not. The Hague Convention and ICARA contemplate expeditious proceedings, but do not require that courts ignore generally applicable law in making their decisions. The Levines have found no Hague cases in which the court denied an objecting party discovery and/or an evidentiary hearing prior to entering judgment. The Levines do not dispute that summary proceedings may be appropriate in some Hague cases, but those proceedings should abide by the rules and laws of the countries in which the proceedings are held. This Court, through Celotex and other decisions, encourages the use of summary proceedings in virtually all

cases, but only when the "plain language" of Rule 56 is followed.

Denying discovery altogether, of course, is a draconian means of expediting a process. The district court could have utilized any number of other methods by which to move this case along in a timely manner, including permitting discovery but reducing the time periods for responding to it, or limiting the areas in which discovery would be permitted. As it was, the case took just two months from filing to decision in the trial court. There was no undue delay by any party, and permitting some sort of discovery consistent with Celotex and Rule 56(c) would not have burdened the court or the parties.

It is worth noting that the Sixth Circuit, citing decisions of this Court, had declared unequivocally in no fewer than two cases (Vance and Buchholzer) prior to March v. Levine that the entry of summary judgment *without permitting the opposing party discovery* was an abuse of discretion. The court of appeals then decided in this case that "given the *unique* nature of [the Hague Convention], the district court *did not abuse its discretion* when it granted summary judgment in favor of March prior to discovery or an evidentiary hearing."

This cannot be the law in the Sixth Circuit or elsewhere. The adage that "speed kills" should not apply to rights under federal law in the same way that it applies to vehicles on the highway. This was a case filed by the plaintiff in federal court and heard under the Federal Rules of Civil Procedure. The requirements of Rule 56(c) are not

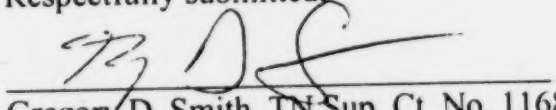
hostage to any statute or treaty. Litigants, including parties in Hague cases, should be able to rely on what this Court refers to as the "plain language" of Rule 56(c) in preparing a response to a summary judgment motion. Although conceivably Congress could pass a law which provides that summary proceedings in certain matters can be decided without regard to Rule 56(c) of the Federal Rules of Civil Procedure, ICARA does not have such a provision. Neither a trial court nor a court of appeals should invent one.

This court should review the decision of the court of appeals in this case in order to reiterate the holding of Celotex that summary judgment under Rule 56 is an appropriate means of resolving disputes, but *only* when the court allows adequate time for discovery prior to a decision. Further, the requirements of Rule 56(c) cannot be disregarded for the sake of expediency.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,



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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-6326/00-6551

PERRY A. MARCH, IN HIS CAPACITY AS FATHER OF SAMSON LEO MARCH AND TZIPORA JOSETTE MARCH, BOTH MINOR CHILDREN, PETITIONER-APPELLEE/CROSS-APPELLANT

v.

LAWRENCE E. LEVINE; CAROLYN R. LEVINE, RESPONDENTS-APPELLANTS/CROSS-APPELLEES

[Argued: March 14, 2001
Decided and Filed: April 19, 2001
Rehearing Denied July 9, 2001]

OPINION

Before: KENNEDY and SUHRHEINRICH, Circuit Judges; GAUGHAN, District Judge. *
SUHRHEINRICH, Circuit Judge.

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* The Honorable Patricia A. Gaughan, United States District Judge for the Northern District of Ohio, sitting by designation.

This appeal involves the International Child Abduction Remedies Act ("ICARA"), *42 U.S.C. § § 11601*-11610 (2000), which is a codification of the Hague Convention on the Civil Aspects of International Child Abduction, **opened for signature**, Oct. 25, 1980, T.I.A.S. No. 11670, 1343 U.N.T.S. 89, *51 Fed. Reg. 10,493, 10,498* (app. B) (March 26, 1986) (hereinafter "Hague Convention"). The Hague Convention was adopted by the signatory nations "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, pmbl.

Under the ICARA, a petitioner must establish by a preponderance of the evidence that his children were wrongfully removed or retained in breach of his custody rights under the laws of the Contracting State in which the children habitually resided before they were removed or retained. Hague Convention, arts. 3, 12; *42 U.S.C. § 11603*(e)(1)(A). Once wrongful removal is shown, the children must be returned. Hague Convention, art. 12. However, a court is not bound to order return of the children if the respondents establish certain exceptions under the treaty. Hague Convention, art. 13. The ICARA requires that a respondent establish by clear and convincing evidence the grave risk of harm exception under article 13(b),[1] and the protection of fundamental freedom

[1] This exception provides that a court is not bound to return a child if the person opposing return establishes that "there is a

provision of article 20.[2] *42 U.S.C. § 11603*(e)(2)(A). Notwithstanding these exceptions, the treaty further provides that "the provisions of this Chapter [pertaining to return of children] do not limit the power of a judicial or administrative authority to order the return of the child **at any time**." Hague Convention, art. 18 (emphasis added).

Respondents Lawrence E. Levine and Carolyn R. Levine ("the Levines"), the grandparents of two minors, Samson Leo March and Tzipora Josette March, appeal the order entered by the district court in this action under the ICARA and the Hague Convention which directed the Levines to immediately return the two minor children to their father in Mexico. Petitioner Perry A. March ("March"), the biological father of Samson and Tzipora, cross-appeals portions of the order decided adversely to him. We **AFFIRM** the district court's order, adopting its well-reasoned opinion. **See *March v. Levine*, *F. Supp. 2d* , *2000 U.S. Dist. LEXIS 20266*,** No. 3:00-0736 (M.D. Tenn. Oct. 4, 2000).

I.

This case involves an American father who moved to Mexico with his two biological children, of whom he had custody. It also involves two American maternal

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grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention, art. 13(b).

[2] This provision states that return of a child "may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Hague Convention, art. 20.

grandparents who obtained court-ordered visitation rights, then removed the children from Mexico and returned with them to the United States, and then retained them after the end of the court-ordered visitation. The father seeks return of his children under the ICARA and the Hague Convention.

The mother of the children disappeared in 1996 and her parents, the Levines, believe she was murdered by her husband, March. This is the basis for the Levines' fervent belief that March should not have custody of their grandchildren. However, there have also been allegations that the maternal grandfather, Mr. Levine, killed his own daughter.[3] March has not been charged, nor apparently has anyone else has been charged, with the murder of the children's mother. The Levines were nevertheless successful in obtaining a default judgment as a discovery sanction against March in a wrongful death action which held that he killed his wife. March vehemently objects to being characterized as a killer and asserts that his wife disappeared, abandoning him and the children.

Additional facts are set forth in the district court's opinion. **March,** *F. Supp. 2d at , 2000 U.S. Dist. LEXIS 20266,* No. 3:00-0736.

On or about June 15, 2000, the Levines arrived in Jalisco, Mexico, to visit the March children pursuant to an **ex parte** order entered by an Illinois court on May 17, 2000.[4] This Illinois order granted them a thirty-nine day

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[3] This is acknowledged by the Levines. Final Br. on Behalf of Appellants at 28.

[4] March moved with his children from Tennessee to Illinois in

period of uninterrupted visitation with Samson and Tzipora. Although the visitation order did not restrict the Levines' ability to travel with the children, the order did not authorize the Levines to remove the children from Mexico for visitation. The Levines obtained a Mexican court order giving effect to the Illinois visitation order, but the Mexican order explicitly required that the visitation occur in Guadalajara, Mexico. The Levines went to the children's school, accompanied by the Mexican judge and armed police, and took physical possession of the children pursuant to these orders on June 21, 2000. That same night, contrary to the Mexican court order, they left Mexico with the children and returned with them to Tennessee, where the Levines reside. There is an outstanding Mexican arrest warrant against the Levines and their adult son, who is also one of their attorneys on appeal, for the kidnapping of the children.

The Illinois court-ordered visitation period expired July 30, 2000. Since that time, the Levines have refused to return the children to their father in Jalisco, Mexico, where the children had resided for more than one year prior to their removal. Instead, the Levines have sought termination of March's parental rights and custody of their grandchildren by instituting proceedings in Tennessee.

March filed his Petition for Return of Children under the ICARA on August 3, 2000, asserting that they were wrongfully removed from their habitual residence in

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1996 after his wife's disappearance. Shortly after he relocated to Illinois, the Levines sought grandparent visitation there. In 1999, March relocated to Mexico.

Mexico in violation of his custody rights and the Hague Convention. In addition to the return of his children, March requested that the district court expedite matters; enter a provisional order directing the Levines to return his children pending a hearing, or alternatively, that the court grant him immediate rights of access, including telephone contact with the children and a schedule for the children to have time with him until a hearing on the merits; that trial be set in advance of the children's school year; and other relief.

The Levines filed a sworn Answer on August 22, 2000. Among numerous defenses raised, the Levines asserted that March should be disentitled from bringing his petition before the court under the fugitive disentitlement doctrine. They also asserted that Mexico is not the habitual residence of the children, as required for the return of children under articles 3 and 12 of the Hague Convention. They further asserted exceptions to return of children under articles 13(b) and 20 of the treaty, i.e., that return of the children to March would present a grave risk of psychological and physical harm as well as place them in an intolerable situation, and that return of the children would violate human rights and fundamental freedoms. In addition, they asserted that full faith and credit were due to various state and Mexican court decisions under a variety of legal theories, including "abstention."

On August 30, 2000, March moved for summary judgment or partial summary judgment on the question whether the Levines wrongfully removed or wrongfully retained the children under the ICARA. The next day, the

Levines moved to dismiss the petition based on March's inability to establish that Mexico was the children's habitual residence, and the fugitive disentitlement doctrine.

On September 1, 2000, the district court ruled that it would decide these pending motions prior to allowing any discovery. More than a month later, and after the court allowed a voluminous amount of evidence into the record in conjunction with the parties' briefs and independently sought information under the terms of the treaty,[5] the district court entered a fifty-two page opinion and an order in which it granted March's petition and ordered the Levines to immediately return the children to him. Specifically, the district court held that March had met his burden of establishing wrongful retention. It further held that the Levines had not met their burden of showing exceptions to return of children under the treaty. In addition, it declined to disentitle March from bringing his petition. However, the court, in aid of appellate jurisdiction, stayed its order until October 10, 2000, or until further direction from this Court.

Both parties appealed. A panel of this Court ordered a temporary stay of the district court's order until the Levines filed a substantive motion seeking a stay. After the Levines filed such a motion, this Court granted a stay of the

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[5] The Hague Convention requires a court to consider social background information of the children provided by the Central Authority of the children's country of habitual residence. Hague Convention, art. 13. Here, the district court requested a variety of such information. It also conducted separate **in camera** interviews of Samson and Tzipora with the assistance of a licensed clinical psychologist.

district court's order pending resolution of the instant appeal and cross-appeal.

Regarding the merits, on appeal before this Court the Levines argue that the district court erred when it declined to disentitle March from pursuing his petition under the fugitive disentitlement doctrine based on various state court orders of contempt. They also contend that the district court erred when it refused to allow discovery or a hearing on the merits prior to ruling on the petition, or otherwise permit them to develop their affirmative defenses. They further argue that the district court erred when it granted summary judgment in favor of March. Finally, in their combined brief replying to March's response to their appeal and responding to March's cross-appeal, the Levines assert that the **Younger** abstention doctrine is applicable to this case.

On cross-appeal, March argues that the district court erred when it failed to address his argument that the Levines have no standing to assert any defenses. He also argues that the district court erred when it considered certain audiotapes as admissible evidence for purposes of ruling on his petition.

II.

In addressing the questions raised in this appeal, we must keep in mind the following general principals inherent in the Hague Convention and the ICARA:

First, a court in the abducted-to nation has jurisdiction to decide the merits of an abduction claim, but not the merits of the underlying custody dispute. Second, the Hague Convention is generally intended to restore the

pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court. ***Friedrich v. Friedrich***, *78 F.3d 1060, 1063-64 (6th Cir. 1996)* (citations omitted).

A.

As a preliminary matter, we need not address the Levines' abstention argument. Having invoked the jurisdiction of this Court, and in light of their goal to overturn the district court's order to return the children, the Levines' argument that "this court ... abstain" is absurd. Final Combined Reply and Resp. Br. on Behalf of the Appellants at 43.

B.

The Levines also argue as a threshold matter that the district court erred in declining to disentitle March from bringing his petition based on his fugitive status from various state court contempt orders.

Having carefully reviewed the parties' briefs in light of the applicable law, we hold that the district court did not abuse its discretion when it declined to disentitle March for the reasons set forth in its opinion. **See March**, F. Supp. 2d at , No. 3:00-0736 at 42-51 (applying the factors set forth in ***Degen v. United States***, *517 U.S. 820, 135 L. Ed. 2d 102, 116 S. Ct. 1777 (1996)* (discussing application of the fugitive disentitlement doctrine), in light of ***Troxel v. Granville***, *530 U.S. 57, 147 L. Ed. 2d 49, 120 S. Ct. 2054 (2000)* (plurality opinion) (discussing the liberty interests of parents in the care, custody, and control of their children as being "perhaps the oldest of the fundamental liberty interests")). We therefore incorporate and adopt the district

court's reasoning as the holding of this Court. However, we wish to comment briefly on the matter.

In arguing that March should have been disentitled from accessing the district court to seek return of his children, the Levines point to various state court contempt orders entered in both Illinois and Tennessee. The Illinois contempt orders arose during grandparent visitation proceedings, and stem primarily from March's failure to appear with the children.[6] The Tennessee orders, on the other hand, pertain to a probate proceeding. These contempt orders stem from March's alleged misconduct in a deposition and orders requiring him to repair some furniture and return various items of personal property, including a beaded evening bag and a baby blanket. The Tennessee contempt orders, among other penalties, ordered March to be imprisoned and fined, and ordered the court clerk to take appropriate action to enforce collection of the $ 50 per day fine (that then totaled $ 22,300) for March's failure to deliver the items.[7]

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[6] Most of the Illinois contempt orders were entered **after** March moved to Mexico. An earlier contempt order was vacated on appeal. **See *In re Visitation of March*, *298 Ill. App. 3d 1146, 738 N.E.2d 228, 250 Ill. Dec. 264,*** slip op. at 20-21, 26-27 (Ill. App. Ct. 1st Dis. 1998) (holding that March's due process rights were violated when the court conducted a hearing without notice to March; that the court improperly granted the grandparents equal, if not superior, visitation rights over those of the natural father; that an injunction preventing March from removing the children from Illinois was improperly entered without notice to him; and vacating the contempt for violation of the injunction).

[7] In his sworn declaration pursuant to *28 U.S.C. § 1746*, March avers that he is unable to purge himself of the contempt despite

At the outset, we note that, however labeled, none of these contempt orders were "criminal" contempts because the fines at issue were avoidable by performance of the required acts and no definite sentences were imposed. **See *Hicks ex rel. Feiock v. Feiock*, *485 U.S. 624, 631-32, 99 L. Ed. 2d 721, 108 S. Ct. 1423 (1988)*** (holding that the substance of the proceedings and the character of relief determines whether a contempt is of a civil or criminal nature). Furthermore, March is arguably not a fugitive given that the orders were entered against him **after** he moved to Mexico, especially when no order limited his travel at the time he moved. **Cf. *Degen*, *517 U.S. at 823-24, 828*** (declining to resolve the question whether Degen was a fugitive in all senses of the word where he had moved to Switzerland about one year prior to being indicted by a federal grand jury). Moreover, the Illinois court relinquished jurisdiction in the visitation proceeding before March filed his ICARA petition invoking the protections of the Hague Convention. The Illinois court thus indicated it has no interest in enforcing its orders.

To the extent that civil contempts have formed the basis for disentitlement, such cases are inapposite to the facts here because they involved appellate-level application of the doctrine to an appellant who was a fugitive from

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his sincere desire to do so because he has looked for the items and has been unable to find them. He also avers that he personally testified to this and submitted sworn affidavits to this effect before the Tennessee court who imposed the contempt orders.

contempt orders entered by the district court in the case sub judice. ***United States v. Barnette***, *129 F.3d 1179 (11th Cir. 1997)*; ***Empire Blue Cross & Blue Shield v. Finkelstein***, *111 F.3d 278 (2d Cir. 1997)*; ***Stern v. United States***, *249 F.2d 720 (2d Cir. 1957)* (per curiam). Here, all the contempt orders were entered by state courts and involved other kinds of proceedings than the Hague Convention petition at issue here. We decline to expand the fugitive disentitlement doctrine "to sanction by dismissal any conduct that exhibited disrespect for any aspect of the judicial system." ***Ortega-Rodriguez v. United States***, *507 U.S. 234, 246, 122 L. Ed. 2d 581, 113 S. Ct. 1199 (1993).*

It is worth re-emphasizing the **Degen** Court's guidance to courts in deciding whether to disentitle a claimant: there must be "restraint in resorting to inherent power" and its use must "be a reasonable response to the problems and needs that provoke it." ***Degen***, *517 U.S. at 823-24* (citations omitted). As the First Circuit recently recognized in an ICARA case,

Applying the fugitive disentitlement doctrine would impose too severe a sanction in a case involving parental rights. Parenthood is one of the greatest joys and privileges of life, and, under the Constitution, parents have a fundamental interest in their relationships with their children. To bar a parent who has lost a child from even arguing that the child was wrongfully removed to another country is too harsh.

Walsh v. Walsh, *221 F.3d 204, 216 (1st Cir. 2000)* (citations omitted). Given the fundamental rights at issue, we agree that disentitlement will generally be too harsh a sanction in a case involving an ICARA petition.

Here, even if the contempts were criminal in nature and March was clearly a fugitive from them, had the district court disentitled March from even arguing his ICARA petition because he did not return a beaded evening bag and a baby blanket it would have been an unreasonable response and an abuse of discretion. An ICARA petitioner should not be disentitled on such patently insignificant grounds. The district court therefore properly rejected the Levines' vindictive attempt to deprive March of his day in court. **Malitiis hominum est obviandum**.

C.

The Levines also argue that the district court erred in granting summary judgment in favor of March. Again, having reviewed the parties' briefs in light of the applicable law, we also hold that the district court did not err in granting summary judgment in favor of March for the reasons set forth in its opinion. **March**, F. Supp. 2d at , No. 3:00-0736 at 9-41. In brief, the district court found that March met his burden of establishing his custody rights in his children, that they were wrongfully retained by the Levines beyond the period of court-ordered visitation, and that the children habitually resided in Mexico at the time of their removal and wrongful retention and that the Levines failed to establish genuine issues of material fact on these issues. **March**, F. Supp. 2d at , No. 3:00-0736 at 7, 9, 16, 18. In regard to the Levines' assertions that the exceptions to return of children under the treaty were applicable, the court found that they had not carried their burden, under the heightened clear and convincing evidence standard, of establishing that there were genuine

issues of material fact regarding the treaty exceptions they raised. **March**, F. Supp. 2d at , No. 3:00-0736 at 39, 41-42. We therefore incorporate and adopt the district court's thorough reasoning as the holding of this Court in regard to this issue as well. We pause only to comment briefly on the Levines' treaty exceptions and the highly unusual nature of this case.

When a motion for summary judgment is made and supported by competent admissible evidence, the nonmovant may not rest on his pleadings, but must come forward with affidavits or other admissible evidence setting forth "specific facts showing there is a genuine issue for trial." ***Anderson v. Liberty Lobby, Inc.***, *477 U.S. 242, 250, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986)* (quoting Fed. R. Civ. P. 56(e)). To determine whether a factual dispute is genuine the court inquires "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." ***Id.*** *at 251-52.* A mere scintilla of evidence is insufficient. ***Id.*** *at 252.* Moreover, the evidence presented must be viewed through the prism of the substantive evidentiary burden, i.e., by the preponderance of the evidence or by clear and convincing evidence. ***Id.*** *at 254.* The evidence of the non-movant must be believed and all reasonable inferences must be drawn in the non-movant's favor. ***Id.*** *at 255.*

Under the treaty and the ICARA, once the petitioner establishes wrongful removal or retention, as here, the respondent must establish by clear and convincing evidence the narrow exceptions under articles 13b and 20. Hague

Convention, arts. 13b, 20; *42 U.S.C. § 11603*(e)(2)(A); ***Friedrich***, *78 F.3d at 1067.* In dicta, the **Friedrich** court stated:

We believe that a grave risk of harm for the purposes of the Convention can exist in only two situations. First, there is a grave risk of harm when return of the child puts the child in imminent danger **prior** to the resolution of the custody dispute--**e.g.,** returning the child to a zone of war, famine, or disease. Second, there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

Id. *at 1069.*

The Levines principally argued, pursuant to article 13(b) of the treaty, that the children should not be returned to March because to return them would present a grave risk of psychological and physical harm to Samson and Tzipora and place them in an intolerable situation. The Levines rely in large part on a default judgment they obtained in a wrongful death action against March after the disappearance of their daughter.

We find the circumstances surrounding the entry of this default, like the circumstances surrounding the Tennessee contempt orders, highly unusual, and suggestive of the home court advantage that the treaty was designed to correct. Specifically, this default judgment was entered as a discovery sanction. The Tennessee court denied a request by March to have his deposition conducted by telephone or

videotape.[8] Then, when March did not present himself for the deposition locally, the Tennessee court ordered March's answer stricken and precluded him from presenting any testimony regarding defenses, declared that all the Levines' declarations in their petition were true and correct, and entered a default solely on the basis of the allegations contained in the Levines' pleadings. The default judgment declared Janet Levine March dead and that March killed her. Thus, the Levines never proffered evidence of their allegations in the state court proceedings. March, on the other hand, has averred in a sworn declaration that he did not kill his wife, that she drove away one evening, that there is no evidence of which he is aware that she is deceased, and that he is appealing the default judgment.

Even assuming that the default judgment would be upheld on appeal, that it should be given preclusive effect in these proceedings, and that it is sufficient to show that there is some risk of harm to the children in being returned to March, this default judgment is not clear and convincing evidence that there is a **grave** risk of harm to the children in being returned to their father. Our review of the record, like that of the district court, shows no allegations by the Levines over the many years that they pursued visitation with the children that March has harmed them or would harm them. Nor have the Levines made any showing of

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[8] At the time, March was living and working in Mexico trying to support his family while defending against the wrongful death claim. March avers that his finances and the necessity of caring for his children did not allow him to travel to Nashville, Tennessee, for the deposition.

serious abuse much less neglect of the children by March. At best, the default judgment might raise a tenuous inference that he might hurt his children. Even that inference, however, does not rise to the level of an imminent risk of grave harm. Further, the children are not being returned to any other type of circumstances that would place them in imminent harm, such as to a war zone, or to an area of rampant disease or famine. The Levines also have not shown the Mexican authorities incapable of or unwilling to protect the children. Indeed, the Levines were successful in obtaining the assistance of the Mexican authorities to enforce a visitation order. This demonstrates that the foreign authorities will hear and consider the Levines' arguments should they seek relief under the visitation and custody laws of Mexico.

The Hague Convention and the ICARA were specifically designed to discourage those who would remove or retain children in the hopes of seeking a "home court advantage" by ensuring that children wrongfully removed or retained would be returned to their place of habitual residence so that custody determinations are made there. By invoking the treaty's exceptions in this case, what the Levines truly seek is a determination regarding the adequacy of March as a parent in light of his wife's disappearance. This falls squarely within the "forbidden territory" of deciding the merits of the parties' custody dispute: ***Friedrich***, *78 F.3d at 1065*. The district court properly recognized the Levines' argument for what it is, and declined to enter this forbidden territory.

D.

The Levines argue that the district court erred when it granted summary judgment in favor of March without allowing discovery or an evidentiary hearing. They also complain that they were not allowed to develop their treaty defenses under articles 13 and 20 of the Hague Convention prior to the court's grant of summary judgment in favor of March.

We adopt the district court's opinion on this point also. We take a few moments to elaborate, however, since this is apparently a question of first impression.

We review for an abuse of discretion a claim that summary judgment was prematurely entered because additional discovery was needed. ***Vance ex rel. Hammons v. United States***, *90 F.3d 1145, 1149 (6th Cir. 1996).* However, such an argument is not preserved for appeal unless it is first advanced in the district court by the filing of an affidavit pursuant to Federal Rule of Civil Procedure 56(f), or by the filing of a motion for additional discovery. **Id.** (citing ***Plott v. General Motors Corp.***, *71 F.3d 1190, 1196 (6th Cir. 1995)).* Assuming that a motion for discovery without an accompanying affidavit is sufficient,[9]

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[9] This Court has recently noted that the plain language of Rule 56(f) requires an affidavit, and that other Circuits have strictly construed the Rule. ***Cacevic v. City of Hazel Park***, *226 F.3d 483, 488-89 (6th Cir. 2000)* (declining to address the issue whether an affidavit is necessary because the plaintiffs did not comply with the requirements of the rule). The plain language of Rule 56(f) requires an affidavit that "the party cannot for reasons stated present by affidavit facts essential to justify the party's

the Levines filed such a motion. Nevertheless, the Levines' motion sought discovery only to develop proof regarding the narrow issue of the children's habitual residence, not any of the treaty exceptions to return of the children or any other issue. Therefore, we review the issue raised only as it pertains to their discovery request.

"The general rule is that summary judgment is improper if the non-movant is not afforded a sufficient opportunity for discovery." ***Vance**, 90 F.3d at 1148.* "If the non-movant makes a proper and timely showing of a need for discovery, the district court's entry of summary judgment without permitting him to conduct any discovery at all will constitute an abuse of discretion." ***Id.** at 1149.* Thus, although **Vance** indicates that summary judgment is improper without discovery, it acknowledges that this is only a general rule.

At the same time, however, the plain language of Rule 56 "does not specifically require or even expressly

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opposition." Fed. R. Civ. P. 56(f). The Levines did not file a Rule 56(f) **affidavit**. They filed a **motion** for discovery. Moreover, although their motion contained a statement that it was signed and verified by the Levines "as an affidavit," the Levines did not sign the document. Thus, if Rule 56(f) requires an affidavit that explains why the party "cannot for reasons stated present by affidavit facts essential to justify the party's opposition," the Levines' argument about discovery as it pertains to the issue of habitual residence is not preserved for review. Nevertheless, because we are constrained to follow **Vance**, we assume the motion the Levines filed is sufficient to preserve this issue for review.

authorize receipt of oral evidence and other types of evidence in a hearing setting." 11 James Wm. Moore et al., Moore's Federal Practice § 56.15[1][a], at 56-200 to 56-201 (3d ed. 2000). Moreover, "oral testimony is not favored in summary judgment proceedings due to the well founded reluctance to turn a summary judgment hearing into a trial." **Id.** at 56-202. Further, a court has discretion to hear evidence on motions by oral testimony or on affidavits. Fed. R. Civ. P. 43(e). Here, the court properly elected the latter.

However, these are not the only concerns at issue in this case. As the district court properly observed, the Hague Convention and the ICARA raise unique concerns:

This type of case is appropriate for resolution by summary judgment. Indeed, the language of the Convention supports resolution by such means. Article 11 provides that a court, when faced with a petition under the Convention, should "act expeditiously in proceedings for the return of children." Courts are to place these cases on a "fast track" in order to expedite these proceedings and carry out the purposes of the Convention.

The language of the Convention also authorizes courts to "take notice directly of the law of, and of judicial and administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable."

There is no requirement under the Hague Convention or under the ICARA that discovery be allowed or that an

evidentiary hearing be conducted. Thus, under the guidance of the Convention and the statutory scheme, the court is given the authority to resolve these cases without resorting to a full trial on the merits or a plenary evidentiary hearing. **March**, F. Supp. 2d at , No. 3:00-0736 at 2-3 (citations omitted).

We agree. The petition for return of children at issue here is not a run-of-the-mill case that falls within the general rule so that it may be said that the district court abused its discretion. Rather, this case involves a petition under a unique treaty and its implementing legislation, neither of which expressly requires a hearing or discovery. In fact, the treaty requires not only expeditious action by courts under article 11, as the district court properly noted, but use of "the most expeditious procedures available." Hague Convention, art. 2. Indeed, the drafters of the treaty stressed the emergency nature of these cases: "Its nature is one of emergency because it seeks a speedy and immediate solution to the cases involved." Elisa Perez-Vera, **Report of the Special Commission, in** 3 Actes et documents *de la Quatorzieme Session 172, 179 P 25* (Permanent Bureau of the Hague Conference on Private International Law ed. and trans. 1980) (official English translation).[10]

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[10] According to the Legal Analysis of the Hague Convention prepared by the Department of State, the Perez-Vera Report "is recognized ... as the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention." Legal Analysis of the Hague Convention on the Civil Aspects of International Child Abduction, *51 Fed. Reg. 10,494, 10,503* (March 26, 1986); **see also *Whallon v. Lynn***, *230 F.3d 450, 455 n.5 (1st Cir. 2000).*

In addition to the requirement of expeditious action, the treaty has a number of provisions to help ensure that return proceedings are handled in such a manner and that return of children to their country of habitual residence is likely. For example, the treaty sets forth generous rules regarding authentication of documents and judicial notice. Hague Convention, art. 14. The treaty further provides rights to petitioners when a decision is not rendered within a mere six weeks of filing their petition. Hague Convention, art. 11. Importantly, the treaty also provides that a court may order return of a child at any time, notwithstanding proof of treaty defenses. Hague Convention, art. 18 ("The provisions of this Chapter [pertaining to return of children] do not limit the power of a judicial or administrative authority to order the return of the child at any time.").

Likewise, the ICARA repeatedly uses the word "prompt" to describe the nature of proceedings for the return of a child wrongfully removed or retained. *42 U.S.C. § 11601*(a)(4). Like the treaty itself, the implementing legislation also provides a generous authentication rule. *42 U.S.C. § 11605* ("No authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court."). Such a provision serves to expedite rulings on petitions for return of children wrongfully removed and retained. Expeditious rulings are critical to ensure that the purpose of the treaty - **prompt** return of wrongfully removed or retained children - is fulfilled. Hague Convention, art. 1.

We further note that courts in other Contracting States to the treaty have also upheld summary proceedings on review. For example, an Australian court has held that the Convention's primary purpose "is to provide a summary procedure for the resolution of the proceedings and, where appropriate, a speedy return [of children] to the country of their habitual residence." **In the *Marriage of Gazi*, *(1992) 16 Fam. L.R. 180, P 9,* available at** http://scaletext.law.gov.au/html/famdec/0/92/0/FM000720.htm (last visited March 22, 2001). The Australian court therefore ruled that the trial court "properly adopted a summary form of procedure." **Id.** (opining that allowing cross-examination of deponents of affidavits may be appropriate in rare cases; noting that it was apparent that the trial court had considered all relevant material before it, including affidavits).

Finally, we note that although the district court ruled that it would decide the motions before it without discovery, it nonetheless entered a voluminous amount of evidence into the record from both parties. Indeed, over 1,300 pages were filed with the district court and made part of the record on appeal. Moreover, review of the district court's opinion reveals that the court carefully considered the evidence both parties offered and independently sought information on its own volition. In sum, given the unique nature of this treaty, we hold that the district court did not abuse its discretion when it granted summary judgment in favor of March prior to discovery or an evidentiary hearing.

E.

Given our affirmance of the district court's rulings, we need not reach the issues raised in March's cross-appeal.

III.

The district court's order that the children be immediately returned to their father in Mexico is **AFFIRMED,** and our prior order issuing a stay of the district court's order pending resolution of these appeals is **VACATED.** Because Samson and Tzipora have been separated from their father for almost one year now, we further order that our mandate issue forthwith pursuant to Fed. R. App. P. 41(a), and that the district court take appropriate action to ensure that the children are reunited with their father with all due speed.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF TENNESSEE, NASHVILLE DIVISION

No. 3:00-0736

PERRY A. MARCH, IN HIS CAPACITY AS FATHER OF SAMSON LEO MARCH AND TZIPORA JOSETTE MARCH, BOTH MINOR CHILDREN, PETITIONER

v.

LAWRENCE E. LEVINE AND CAROLYN R. LEVINE, RESPONDENTS

[Decided and Entered: October 4, 2000]

OPINION

Before: TRAUGER, U.S. District Judge.

TRAUGER, U.S. District Judge.

On August 3, 2000, Perry A. March filed a Petition for Return of Minor Children Pursuant to International Child Abduction Remedies Act, seeking the return of his two minor children, Samson Leo March, age 10, and Tzipora Josette March, age 6, to Mexico. The respondents,

Carolyn R. Levine and Lawrence E. Levine, grandparents of the children, had removed them from Mexico on June 21, 2000 and brought them to Nashville, Tennessee pursuant to a visitation order issued by a court in Chicago, Illinois. Petitioner March has filed a motion for summary judgment (Docket No. 34), and the respondents have moved to dismiss the case based on several grounds, including the fugitive disentitlement doctrine (Docket No. 51).[11]

A. *Legal Standard*

Petitioner seeks the return of his children pursuant to Rule 56 of the Federal Rules of Civil Procedure, which provides that summary judgment may be rendered if "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." FED.R.CIV.P. 56(c).

This court finds that this type of case is appropriate for resolution by summary judgment. Indeed, the language of the Convention supports resolution by such means. Article 11 provides that a court, when faced with a petition under the Convention, should "act expeditiously in proceedings for return of children." Hague Convention, art. 11. Courts are to place these cases on a "fast track" in order to expedite these proceedings and carry out the purposes of the Convention.

The language of the Convention also authorizes courts to "take notice directly of the law of, and of judicial

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[11] A multitude of other motions have been filed by both parties. They will be discussed herein only to the extent that they are relevant to the court's ruling.

and administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable." Hague Convention, art. 14. See also *42 U.S.C.A. § 11605* ("No authentication of such application, petition, document, or information shall be required in order for the application, petition, document, or information to be admissible in court.")

There is no requirement under the Hague Convention or under the ICARA, *42 U.S.C.A. § 11601 et seq.*, that discovery be allowed or that an evidentiary hearing be conducted. See *Sinclair v. Sinclair, 121 F.3d 709, 1997 WL 428897,* at *1 (6th Cir. Jul. 30, 1997) (unpublished opinion) (citing *Cooley v. Carmike Cinemas, Inc., 25 F.3d 1325, 1330 (6th Cir. 1994)* (finding appellant's argument that the district court refused to hear testimony of two witnesses without merit). See also *Kovacevich v. Kent State Univ., 224 F.3d 806, 2000 WL 1205859,* at *23 (6th Cir. 2000). Thus, under the guidance of the Convention and the statutory scheme, the court is given the authority to resolve these cases without resorting to a full trial on the merits or a plenary evidentiary hearing. See, e.g., *Shalit v. Coppe, 182 F.3d 1124 (9th Cir. 1999)* (affirming district court's granting of summary judgment in favor of respondent in ICARA case).

B. *The International Child Abduction Remedies Act*

This petition is brought pursuant to the International Child Abduction Remedies Act ("ICARA"), *42 U.S.C.A. §*

11601 et seq. (1995). The ICARA was enacted in order to implement the provisions of the Hague Convention on the Civil Aspects of International Child Abduction ("Hague Convention" or "Convention").[12] Both the United States and Mexico are signatories to this multi-nation treaty.[13] (Docket No. 84, Response to Petitioner's Statement of Undisputed Facts No. 1)

The Hague Convention was adopted by the signatory nations[14] in order "to protect children internationally from the harmful effects of their wrongful removal or retention and to establish procedures to ensure their prompt return to the State of their habitual residence, as well as to secure protection for rights of access." Hague Convention, Preamble. Actions brought under the Convention are to be resolved as expeditiously as possible. See Hague Convention, art. 11 ("The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.").

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[12] Convention on the Civil Aspects of International Child Abduction, October 25, 1980, 1983 WL 206353 (TIA).

[13] The United States originally signed the Convention on December 23, 1981. On April 29, 1988, the ICARA was enacted. The Convention took effect in the United States on July 1, 1988. See *53 Fed. Reg. 23608 (1988)* (to be codified at 22 C.F.R. pt. 94). The Convention entered into force for Mexico on September 1, 1991. See www.hcch.net/e/members.html (website of the Hague Convention on Private International Law) (visited Sept. 26, 2000).

[14] The Convention is in force between the United States and 48 countries. See http://travel.state.gov/hague_list.html (visited Sept. 26, 2000).

Under the Convention, the removal of a child from one country to another country is to be considered wrongful when

a it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b at the time of removal or retention those rights were actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above, may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Hague Convention, art. 3.

As the petitioner, March has the burden of showing by a preponderance of the evidence that the removal of his minor children from Mexico was wrongful as defined by the Convention. See *42 U.S.C.A. § 11603*(e)(1)(A). Once the petitioner meets this burden, then the burden shifts to the respondents to establish "(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies"; or (B) "by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies." *42 U.S.C.A. § 11603*(e)(2).

Thus, the person opposing the return of a child must establish:

1) by clear and convincing evidence that there is a grave risk that the return of the child would expose the child to physical or psychological harm; Hague Convention, Article 13b, *42 U.S.C. § 11603*(e)(2)(A); 2) by clear and convincing evidence that the return of the child 'would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms'; Hague Convention, Article 20, *42 U.S.C. § 11603*(e)(2)(A); 3) by a preponderance of the evidence that the proceeding was commenced more than one year after the abduction and the child has become settled in its new environment; Hague Convention, Article 12, *42 U.S.C. § 11603*(e)(2)(B); or 4) by a preponderance of the evidence that [the petitioner] was not actually exercising the custody right at the time of removal or retention, or had consented to or subsequently acquiesced in the removal or retention; Hague Convention, Article 13a, *42 U.S.C. § 11603*(e)(2)(B).

Friedrich v. Friedrich, 983 F.2d 1396, 1400 (6th Cir. 1993) ("Friedrich I").[15]

C. *Wrongful Removal or Retention*

The respondents argue that the petitioner cannot carry his initial burden of proof because there has been no wrongful removal or retention of the two minor children. Under the Hague Convention, "'wrongful removal' refers to the taking of a child from the person who was actually exercising custody of the child" and "'wrongful retention' refers to the act of keeping the child without the consent of the person who was actually exercising custody." *51 Fed. Reg. 10494, 10503 (1986)* (Hague International Child Abduction Convention: Text and Legal Analysis).

In their Answer, the respondents state that the two minor children were not wrongfully removed from Mexico because they "lawfully had physical custody of the Children at the time they were returned to the United States." (Docket No. 22 at 1) Furthermore, the children have not been wrongfully retained in the United States because "they have remained pursuant to an Order of the Juvenile Court for Davidson County, Tennessee." Id. The court finds this argument without merit.

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[15] In Friedrich I, the Sixth Circuit reversed the district court's denial of the father's petition to return the child to Germany and remanded the matter to the district court on the issue of whether, under German law, the father had custody rights at the time of the child's removal that he was exercising or would have exercised but for the removal. The Sixth Circuit affirmed the district court's subsequent order to return the child to Germany in *Friedrich v. Friedrich, 78 F.3d 1060 (6th Cir. 1996)* ("Friedrich II").

In October 1999, the Circuit Court for Cook County (Chicago), Illinois granted the Levines' petition for grandparent visitation, allowing them prescribed times of visitation with the children.[16] (Docket No. 54, Ex. 7) On May 17, 2000, the Circuit Court ordered, in response to the Levines' emergency petition for "catch-up" visitation[17] under the October 1999 order, that "the minor children ... be immediately turned over to the Levines' physical custody for visitation for an uninterrupted period of 39 days ...." (Docket No. 26, Ex. 1(a)). Pursuant to a Letter Rogatory issued by the Illinois court, the respondents were able to secure a Mexican court order to enforce the Illinois visitation order. See Docket No. 26, Ex. 2; Docket No. 103. It was on the basis of these orders that the respondents were

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[16] The October 1999 order was entered after March and the children had been living in Mexico for a number of months. It contemplates the Levines picking up the children in and returning the children to Mexico. It further provides that "during the children's regular school year, the children shall not miss school during such monthly weekend visitation." (Docket No. 54, Ex. 7)

[17] March complied with the visitation in June and July 1999. March states that "the travel was horrendous on the children" and "after the children suffered a seriously traumatic flight home to Guadalajara by themselves at the end of the July [1999] weekend visitation in Illinois, ... I did not send the children to Illinois for a weekend of grandparental visitation, in a state and place where no one lived, in disregard for my children's health." (Docket No. 40, March Declaration at PP58-59, 62, 64) He claims to have consulted an attorney and discontinued the visitation trips based on that legal advice. Id. at PP62-64.

able to remove the children from their school in Mexico on June 21, 2000.[18]

The respondents did not return the children to their father after the period of visitation because, by that time, they had secured a court order from the Nashville Davidson County Juvenile Court granting them temporary custody of the children (beyond visitation rights) pending a determination on their petition to terminate the parental rights of the father.[19]

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[18] The petitioner has submitted numerous affidavits and documentation supporting his contention that the respondents were not supposed to take the children out of Mexico during the 39 days of visitation, including a warrant for the arrest of the respondents and their son for the kidnapping of the minor children. See Docket No. 40, March Declaration, Ex. B. See also Docket No. 40, March Declaration, Exs. J-N; Docket No. 38, Carmen Rojas de March Declaration at PP35-37, 43; Docket No. 78, Palfrey Declaration at PP25-30. The respondents have also submitted numerous affidavits on the issue of whether they were prohibited from removing the children from Mexico on June 21, 2000. See Docket No. 84, Ex. 1 (Levines' Affidavit); Docket No. 104 (Chavira Declaration); Docket No. 105 (Ramos Declaration).

The court finds that this factual dispute need not be resolved in order to decide the petitioner's motion for summary judgment because, regardless of whether the children were to be removed from Mexico for the visitation period, the Illinois court order provided that they were to be returned to Mexico at the end of the 39 days of uninterrupted visitation. (Docket No. 26, Ex. 1 (a)) The respondents do not claim that any Mexican court order provided otherwise.

[19] On July 3, 2000, the Levines filed an Emergency Petition for Custody, Termination of Parental Rights, Guardianship, Finding that the Children are Dependent and Neglected, and for Entry of a Restraining Order in the Juvenile Court of Davidson County,

On January 21, 2000, the Probate Court for Davidson County had entered judgment by default in favor of the Levines, as a discovery sanction, in a wrongful death action brought by the Levines against Perry March for the death of their daughter, Janet Gail March.[20] (Docket No. 54, Ex. 1) Effective May 8, 2000, at the behest of the Levines,[21] Tenn. Code Ann. § 36-1-113(g) had been amended to add, as a ground for the termination of parental rights, the fact that the surviving parent "has been convicted of or found civilly liable for the intentional and wrongful death of the child's other parent or legal guardian."[22] On the basis of this wrongful death judgment and the new amendments, the Levines filed a petition in the Juvenile Court for Davidson County, Tennessee on July 3, 2000 for the termination of Perry March's parental rights

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Tennessee. See Docket No. 84 at 17.

[20] Janet March disappeared in August 1996, at a time when she and Perry March were having marital problems. (Docket No. 22 at 6, P2) The Levines believe that Perry March killed her. (Docket No. 54, Levines' Affidavit at P5) The case has received enormous coverage in the local press, due in part to the fact that Perry March was named the "prime and only" suspect in her murder. Id. at P12.

[21] See discussion *infra* pp. 38-39.

[22] Tenn. Code Ann. § 36-6-106 was also amended to add the following provision: "Notwithstanding the provisions of any law to the contrary, the court has jurisdiction to make an initial custody determination regarding a minor child or may modify a prior order of child custody upon finding that the custodial parent has been convicted of or found civilly liable for the intentional and wrongful death of the child's other parent or legal guardian."

and an award of custody of the minor children.[23] See Docket No. 54, Levines' Affidavit at P30.

Under the ICARA and the Hague Convention, custody and visitation rights are to be determined in the courts[24] of the country that is the "habitual residence" of the children. See Hague Convention, art. 19; *42 U.S.C.A. § 11601*(b)(4). See also *Friedrich II v. Michele, 78 F.3d 1060, 1063.* The prime purpose of the ICARA and the Convention is to prevent one parent from removing the children from their "habitual residence" and bringing them to the removing parent's residence in order to have the "home court advantage" of a custody determination by a court where the removing party is living. See *id. at 1064* ("The Hague Convention is generally intended to restore the pre-abduction status quo and to deter parents from crossing borders in search of a more sympathetic court.").

So if Mexico was the "habitual residence" of these children at the time the Levines removed them to Nashville, then it would violate the Convention and federal law for the

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[23] In their Answer, the respondents assert that "because an American court has exercised jurisdiction over all custody matters involving the Children since October 1996, the American Courts should continue to exercise jurisdiction in the appropriate U.S. forum." (Docket No. 22 at 5) The July 3, 2000 petition was the first petition for a determination of custody (as opposed to visitation) rights of the two minor children in the United States. Therefore, this "continuing jurisdiction" argument is unpersuasive.

[24] The Convention contemplates that the family courts of the country of habitual residence will be making these determinations (as opposed to its equivalent of federal courts) because these courts have expertise in these issues. See *Catz v.*

Davidson County Juvenile Court to determine that their permanent custody should be transferred to their grandparents. The Hague Convention and federal law would mandate that, in the absence of an "exception" to an order of return (to be discussed hereafter), the Levines seek permanent custody of the children in the courts of Mexico. And if that is the case, the temporary custody order of the Davidson County Juvenile Court does nothing to negate the fact that the Levines are wrongfully retaining the children in Nashville after the expiration of their court-ordered 39 days of grandparent visitation.

D. *Habitual Residence*

March asserts that Samson and Tzipora were habitual residents of Mexico when they were removed by the Levines. The Levines argue that Illinois is the habitual residence of these children.[25]

The Convention and the enabling legislation do not define "habitual residence." In Friedrich I, the Sixth Circuit stated that the concept of habitual residence under the

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Chalker, 142 F.3d 279, 290 (6th Cir. 1998).

[25] In their Motion to Allow Discovery (Docket No. 87), the Levines list sixty-six questions that they believe need to be asked in a deposition of Perry March "in order to develop proof on the issue of whether March and the Children were habitual residents of Mexico." (Docket No. 87 at 4-5) Most of the questions concern the immigration status of March and the children in Mexico. The court finds that, regardless of the answers to these questions, the respondents would still not prevail in their argument that Mexico is not the habitual residence of Samson and Tzipora.

Convention is not to be confused with domicile.[26] Thus, to determine the habitual residence of minor children, "the court must focus on the child, not the parents, and examine past experience, not future intentions." *Friedrich I, 983 F.2d at 1401.* Furthermore, "on its face, habitual residence pertains to customary residence prior to removal." Id. Additional guidance is found in *Feder v. Evans-Feder, 63 F.3d 217, 224 (3d Cir. 1995),* where the court, relying on Friedrich I and In re Bates, held that a "child's habitual residence is the place where he or she has been physically present for an amount of time sufficient for acclimitization and which has a 'degree of settled purpose' from the child's perspective." *Feder, 63 F.3d at 224.* See also *Pesin v. Osorio Rodriguez, 77 F. Supp. 2d 1277, 1284 (S.D. Fla. 1999)* ("Under the Hague Convention, the relevant period of habitual residence is that span of time 'immediately before' the date of the alleged wrongful retention.").

In re Bates at 10 (emphasis added), quoted in *Friedrich I, 983 F.2d at 1401.*

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[26] Because Friedrich I was decided before any courts in the United States had provided guidance on the concept of habitual residence, the Sixth Circuit looked to a British case, In re Bates, No. CA 122.89, High Court of Justice, United Kingdom 1989. In that case, the High Court of Justice stated:

It is greatly to be hoped that the courts will resist the temptation to develop detailed and restrictive rules as to habitual residence, which might make it as technical a term of art as common law domicile. *The facts and circumstances of each case should continue to be assessed without resort to presumptions and presuppositions.*"

Both children were born in Nashville, Tennessee[27] and resided in Tennessee from their births until mid-September 1996.[28] From mid-September 1996 until mid-May 1999, the children lived with their father in Illinois.[29] The children lived in Jalisco, Mexico with March from mid-May 1999[30] until the Levines removed them to Nashville. Thus, the minor children were present in Mexico for a little over a year prior to their removal by the Levines. This is certainly a long enough period of time to establish habitual residence. See *Feder, 63 F.3d at 224* (finding six months to be significant period of time for four-year old

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[27] Samson was born on August 27, 1990. Tzipora was born on May 17, 1994. (Docket No. 84, Response to Petitioner's Statement of Undisputed Facts Nos. 2-3)

[28] The respondents admit that the minor children resided with the petitioner until August 15, 1996, but assert that they were the primary caretakers from August 16, 1996 until September 12, 1996, the period shortly after their daughter (March's wife) disappeared. See Docket No. 84, Response to Petitioner's Statement of Undisputed Facts No. 10.

[29] The respondents dispute the exact date that the petitioner moved to Illinois. See Docket No. 84, Response to Petitioner's Statement of Undisputed Facts No. 11. The court finds the exact date of the move to Illinois is irrelevant to the analysis of the children's habitual residence.

[30] Petitioner states that he left Illinois with his two minor children on May 19, 1999. (Docket No. 40, March Declaration at P49) The respondents dispute the date of the petitioner's move to Mexico, asserting that the petitioner has "variously claimed to have left Illinois on either May 19, 1999 or May 22, 1999." (Docket No. 84, Response to Petitioner's Statement of Undisputed Facts Nos. 11-12) The habitual residence analysis does not depend upon the exact date in May 1999 that the petitioner and his children moved from Illinois to Mexico.

child to have stayed in Australia in concluding Australia to be child's habitual residence).[31]

The most important factor in the analysis is the child's circumstances in the country alleged to be the habitual residence. In August 1999, the petitioner's two children started attending Oak Hill Academy in Ajijic, Jalisco, Mexico. See *Feder, 63 F.3d at 224* (finding child's attendance at school in Australia to be significant, stating that he was "participating in one of the most central activities in a child's life"). Samson entered the third grade and Tzipora was enrolled in Pre-primary or Kindergarten. (Docket No. 78, Palfrey Declaration at P4) According to Wayne C. Palfrey, the Director of Oak Hill Academy, "by the end of the school year, both children had obtained a working and useful knowledge of Spanish, and they were successful in their course studies. Both children were promoted to the next grade." (Docket No. 78, Palfrey Declaration at P6) March was a member of the Board of Directors of the Oak Hill Academy as a representative of the Tzipora's class. Id. at P9. The children participated in school activities, and March and Carmen Rojas de March[32]

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[31] See Dr. E.M. Clive, The Concept of Habitual Residence, JURID. REV., Part 3, 137, 140 (1997) (finding no cases "where a child has been found not to be habitually resident in a country where he or she has lived for a year or more"), quoted in *Mozes v. Mozes, 19 F. Supp. 2d 1108, 1114-15 (C.D. Cal. 1998).*

[32] Palfrey's Declaration refers to this person by the name she apparently took upon her marriage to Perry March. The Levines throughout refer to her by her name prior to the marriage, Carmen DeLangre, and maintain that the marriage is not a legal one. (Docket No. 84, Response to Petitioner's Statement of Undisputed Facts No. 18) For ease of reference, and not out of any disrespect, this court will sometimes refer to this person as simply "Carmen."

were also involved in these activities. Id. at PP7, 20-21. The children were also involved in extracurricular activities in Mexico. (Docket No. 40, March Declaration at P72 ("Samson continued with his cello studies..., and with horseback riding."), P73 ("Tzipi danced ballet, and was socializing very well."))

In addition to attending school in Mexico, the children's family situation changed in a way that further demonstrated a degree of settled purpose to their presence in Mexico. In the summer of 1999, March and his children began living with Carmen and her three minor children, Daro, Thomas, and Cinty.[33] After March and Carmen were married in March 2000, Carmen initiated legal proceedings to adopt Samson and Tzipora. See Docket No. 38, Carmen Rojas de March Declaration at P18, Ex. A. See also Palfrey Declaration at P13 (stating that he "enthusiastically recommended Carmen's adoption of the children to the Jalisco Family Adoption Agency.").

The respondents contend that there is a "lack of a settled purpose" in the children's presence in Mexico for a variety of reasons:

> (1) the wrongful removal of the Children from Illinois in the midst of a visitation dispute there, and his

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[33] See Docket No. 40, March Declaration at PP83, 100, Exs. F, H; Docket No. 38, Carmen Rojas de March Declaration at PP4, 6) Despite the respondents' contentions about the validity of the marriage, there is no dispute that the petitioner and Carmen DeLangre began living together with the petitioner's minor children and Carmen's three minor children in the summer of 1999.

> wrongful detention of the Children in Mexico...; (2) the Children's potentially illegal entry into Mexico; (3) the Children's father's status as a fugitive from at least two criminal warrants for his arrest...; (4) March's illegal conduct in Mexico, which subjects him to deportation...; and (5) March's willingness to marry Carmen Rojas in violation of Mexican bigamy law ...."

(Docket No. 84 at 23) These contentions simply are not relevant for purposes of deciding whether Mexico or Illinois is the habitual residence of the children under the ICARA. First, the cases are clear that there need not be a decision to remain somewhere indefinitely for it to be considered the child's habitual residence. See *Feder, 63 F.3d at 223-24* (citing In re Bates); *Kanth v. Kanth, 79 F. Supp. 2d 1317, 1321 (D. Utah 1999); In re Ponath, 829 F. Supp. 363, 367 (D. Utah 1993); Levesque v. Levesque, 816 F. Supp. 662, 666 (D. Kan. 1993).* Second, the "degree of settled purpose" is to be analyzed not from the parent's perspective but from the child's perspective. *Feder, 63 F.3d at 224.* The primary information about the child's perspective comes from the court's own *in camera* interview with the children.

On September 15, 2000, the court interviewed Samson and Tzipora March in chambers with the assistance

of a licensed clinical psychologist selected by the court.[34] Samson, who is ten, expressed great enthusiasm for his school in Mexico ("I loved it; it was great."), for Carmen ("She is just wonderful. She's real nice with me and Zippy.") and for living in Mexico ("It's perfect weather all year 'round."). Tzipora ("Zippy"), at age six, was, of course, less articulate. But she loves her house in Mexico, referred to one of Carmen's children as her "little brother," likes her school there, and "especially" wanted to hug Carmen. Both children seemed well-adjusted, bright, responsive and surprisingly unscarred by the turmoil surrounding them for the last four years.

The court also looks to March's own statements about why he moved to Mexico as evidence of his intentions as to his children's presence in Mexico.[35] See *Feder, 63 F.3d at 224* (focusing on the "parents' present, shared intentions regarding their child's presence" in country). According to March, he moved with his children to Jalisco, Mexico, where his father lives, "for employment, enjoyment and a fresh start." (Docket No. 40, March Declaration at P28) He states that, "I left Illinois in part because I was unable to earn a sufficient living in Illinois to

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[34] No lawyers or parties were present. Each child was interviewed out of the presence of the other. The tape-recording of this interview and the drawing done by Tzipora during it are filed under seal as exhibits to this memorandum.

[35] Generally, the cases under the ICARA discuss the intentions of both parents and their "shared intentions" as to the child's presence in a particular country. See *Feder, 63 F.3d at 224*. Given the absence of the mother, only the father, Perry March, was exercising custody rights, and only his intentions will be

maintain my children in the manner I was accustomed to and wanted to, for their benefit."[36] Id. at P29. It is clear that the petitioner's move, at the time that it was made, had a settled purpose. See *Feder, 63 F.3d at 223* ("Education, business or profession, employment, health, family or merely love of the place spring to mind as common reasons for a choice of regular abode .... All that is necessary is that the purpose of living where one does has a sufficient degree of continuity to be properly described as settled.").

The respondents argue that the petitioner should not be allowed to "create a habitual residence for the Children by brazenly refusing to abide by Court orders issued in the United States." (Docket No. 50 at 3) The respondents lose sight of the fact that, at the time the petitioner left Illinois, the issue before the Illinois court was a matter of their visitation rights, not the custody of the children. The issue of grandparent visitation was pending before the Illinois court at the time of the move to Mexico, but it seems clear that March did not move to Mexico "to require litigation of custody matters in the new country." (Docket No. 50 at 4) At the time of his move to Mexico, there was no custody matter to be decided in Illinois, Tennessee, or anywhere

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evaluated.

[36] Perry March practiced with his father-in-law's (Respondent Lawrence Levine's) law firm before leaving Nashville. (Docket No. 40, Ex. C at 4) The firm filed a disciplinary complaint against him on November 17, 1998 with the Tennessee Board of Professional Responsibility, (Id. at P37; Docket No. 84, Ex. 3), that apparently prevented him from being admitted to the Illinois bar. He never responded to the complaint and, on September 1, 2000, was disbarred from practicing law in Tennessee. (Docket

else in the United States. The Levines had not yet sought permanent custody of their grandchildren.

The Levines also point to March's assertion to the Illinois court that Illinois has "exclusive personal and subject matter jurisdiction of the parties and the minor Children." See Docket No. 84 at 21 (quoting Docket No. 26, Ex. 5(a) (Emergency Motion for Immediate Turnover of Minor Children, filed July 5, 2000)). In support of this emergency motion, March stated that (1) he has an Illinois driver's license and that is his only driver's license; (2) he has bank accounts in Cook County, Illinois; (3) he is registered to vote in Illinois; and (4) Illinois is where he intends to vote either in person or by absentee ballot. See Docket No. 26, Ex. 5(a), March Affidavit at PP5-8. The Levines argue that these statements "run contrary to his assertion now that Mexico is the habitual residence of the Children and that questions of custody should be litigated there." (Docket No. 84 at 22)

This argument is without merit. March clearly states in this Affidavit that he has been living in Mexico with his children since May 1999. He asserts that "every United States Citizen is entitled to a State of Citizenship." (Docket No. 26, Ex. 5(a), March Affidavit at P4) He makes the statements the Levines rely upon in an effort to make the case that, as between Illinois (where he and the children lived from September 1996 to May 1999 and where three years of grandparent visitation litigation took place) and Tennessee (where he and the children have not lived since September 1996), Illinois ought to be the venue in which

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No. 84, Ex. 3)

this, now, custody battle is fought.[37] March's statements in this Affidavit cannot be interpreted to negate his claim that Mexico is the habitual residence of the two minor children.[38]

The court finds that March has carried his burden of establishing that the habitual residence of the two minor children, Samson and Tzipora, is Mexico.

E. *Rights of Custody*

Under the ICARA, the petitioner must also establish by a preponderance of the evidence that he was exercising custody rights over his minor children in Mexico under Mexican law at the time the children were removed from Mexico. See *Friedrich II, 78 F.3d at 1064.* Article 3 of the Convention provides: "the rights of custody ... may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State." Hague Convention, art. 3. Once the court finds that the petitioner

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[37] The Illinois court initially agreed with him. On July 6, 2000, that court, *sua sponte* enjoined the Levines "from further proceedings in Tennessee," finding that it had and "retains exclusive subject matter and personal jurisdiction over the minor children." (Docket No. 54, Ex. 9) On July 19, 2000, however, the Illinois court reversed course and declined jurisdiction in favor of the Juvenile Court for Davidson County, Tennessee. See Docket No. 84 at 17. This order from the Illinois court has not been provided by the parties, so that court's reasoning is not available to this court.

[38] In their Answer, the respondents also raise estoppel and waiver as affirmative defenses, based on March's assertion in the Illinois court proceedings that it has jurisdiction over the children. (Docket No. 22 at 5) The affirmative defenses are without merit for the same reasons as stated above.

was exercising custody rights over the [**30] minor children, "the court should stop--completely avoiding the question whether the parent exercised the custody rights well or badly." *Friedrich II, 78 F.3d at 1066.*

Under Mexican law, the petitioner's rights of custody arise by operation of law. One source explains custodial rights in Mexico as follows:

> Deriving from the Roman law and the civil law is the concept of patria potestad, which is the parents' responsibility to care for the child, reside with the child, and provide for the child's necessities, including food, education and development. The patria potestad gives a right to correct the child, the right to control and manage any property or rights the child may have and the right to the child's assistance. By law, the right to patria potestad belongs to both parents, but the exercise of the right, by necessity, normally involves one decision-maker. Concurrence or agreement is not required. Historically, the father had superior rights of the patria potestad, but today it is a joint responsibility. If the parents are deceased or unavailable, the paternal grandparents may exercise the patria potestad. If the paternal grandparents are unavailable, the maternal grandparents may exercise the patria potestad.

> Antoinette Sedillo Lopez, *International Law -- U.S./Mexico Cross-Border Child Abduction -- The Need for Cooperation*, 29 N.M. L. REV. 289, 297 (Spring 1999). See also *1996 WL 915784*, Codigo Civil para el Distrito Federal (C.C.D.F.) art. 412 ("An unemancipated minor shall be under the parental authority of any existing parental ascendant, who in turn shall exercise that authority in accordance to Law."); *1996 WL 915790*, C.C.D.F. art. 418 ("In the absence of parents, parental authority shall pass to the remaining ascendants ... in the order to be determined by the Family judge, who shall take into consideration the particular circumstances of the case.").[39]

Under Mexican law, March, as the natural father of the minor children, was exercising his custody rights at the time the two minor children were removed from Mexico by the Levines.[40]

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[39] The petitioner cites the court to similar provisions under the laws of the state of Jalisco, Mexico. See Docket No. 40, March Declaration at P142, Ex. O.

[40] Buried in a footnote, the Levines "acknowledge that they do

F. *Statutory Defenses*

In objecting to the return of the children to Mexico, the respondents raise two statutory defenses under the Hague Convention and the ICARA.[41] The respondents argue that the minor children should not be returned to Mexico to the custody of the petitioner because (1) there is a grave risk that the return of the minor children to Mexico would subject them to psychological and physical harm and would place them in an intolerable position; and (2) the return of the minor children to Mexico would violate human rights and fundamental freedoms. (Docket No. 22 at 3-4)

1. *Grave Risk of Harm*

The respondents raise as affirmative defenses in their Answer their "grave risk" allegations. They assert that

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not dispute that March had custody rights to the Children and was exercising custody rights at the time the Levines picked the Children up in Mexico." (Docket No. 84 at 22 n.4)

[41] The petitioner has filed a Motion to Strike and Dismiss Respondents' Affirmative Defenses (Docket No. 69), arguing that the respondents, as grandparents, do not have standing to raise affirmative defenses in this action. (Docket No. 69 at 12) This is a case of first impression. The court has not found a single case under the ICARA where the two parties to the action are not the parents of the minor children. While the court disagrees with the petitioner that grandparents may never have standing to raise affirmative defenses in an ICARA case, the court does find the respondents' position in this case to be troubling. This is not a situation where the grandparents removed the children from Mexico under a claim of custody rights. All they had been granted were visitation rights. However, since a decision on the merits, rather than one based on standing, should advance the ultimate resolution of this case, the court chooses not to base its ruling on the standing issue.

a return to Mexico would subject the children to: (1) "psychological harm;" (2) "physical harm in that, among other things, March and his agents have threatened to kill the Levines and members of their family and it is physically unsafe for the Levines or the Children to have child custody matters litigated in Mexico;" and (3) "an intolerable situation in that, among other things, they would be expected to reside with the individual who murdered their mother." (Docket No. 22 at PP5-7) They also argue that "March's communications with the Children, his persistent failure to abide by valid court orders, and his other conduct, raise substantial questions about the danger of physical or psychological harm to the children or to the Levines in the event the Children are returned to Mexico, and as to whether the Children would be placed in an intolerable situation there." (Docket No. 84 at 43) Although they requested the opportunity to take discovery, the respondents have put into this record volumes of evidence in support of their allegations. See, e.g., Docket No. 54 with attached exhibits.

Under Article 13b, a court may decline to order the return of a child if the person opposing the return of the child establishes by clear and convincing evidence that "there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation." Hague Convention, art. 13b.[42] See also *42 U.S.C.A. § 11603*(e)(2)(A). Article

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[42] Article 13 of the Convention also provides that a court may refuse to order the return of a child to the child's habitual residence "if it finds that the child objects to being returned and

13 also provides that the court "shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence."

It is clear that, in evaluating whether the person opposing the return of the child has established that there is a grave risk of harm, the court is not to make a determination of the child's best interest.[43] As stated in the often quoted case, *Tahan v. Duquette, 259 N.J. Super. 328, 613 A.2d 486, 489 (N.J. Super.A.D. 1992)*:

> the Article 13b inquiry was not intended to deal with issues or factual questions which are appropriate for consideration in a plenary custody proceeding. Psychological profiles, detailed

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has attained an age and degree of maturity at which it is appropriate to take account of [his or her] views." Hague Convention, art. 13. This ground does not favor the Levines. Even if this court were to find Samson mature enough to take account of his views, he does not object, and in fact greatly looks forward, to his return to his father in Mexico.

[43] See *51 Fed. Reg. at 10510* ("This [Article 13b] provision was not intended to be used by defendants as a vehicle to litigate (or relitigate) the child's best interests."). See also *Friedrich II, 78 F.3d at 1068* ("The exception for grave harm to the child is not license for a court in the abducted-to country to speculate on where the child would be happiest. That decision is a custody matter, and reserved to the court in the country of habitual residence."); *Freier v. Freier, 969 F. Supp. 436, 442 (E.D. Mich. 1996)* ("Nor is the Court entitled to decide where the child would be happiest since that is an issue for the custody court to decide.").

> evaluations of parental fitness, evidence concerning lifestyle and the nature and quality of relationships all bear upon the ultimate issue. The Convention reserves these considerations to the appropriate tribunal in the place of habitual residence .... No court on a petition for return should intrude upon a foreign tribunal's subject matter jurisdiction by addressing such issues.
>
> Furthermore, "[a] decision under this Convention concerning the return of the child shall not be taken to be a determination on the merits of any custody issue." Hague Convention, art. 19. See also *42 U.S.C.A. § 11601*(b)(4).

In Friedrich II, the Sixth Circuit adopted a "restrictive reading" of the "grave risk" exception, stating that "a grave risk of harm for the purposes of the Convention can exist in only two situations." *Friedrich II, 78 F.3d at 1069*. Those situations are:

> First, there is a grave risk of harm when return of the child puts the child in imminent danger prior to the resolution of the custody dispute -- e.g., returning the child to a zone of war, famine, or disease. Second,

> there is a grave risk of harm in cases of serious abuse or neglect, or extraordinary emotional dependence, when the court in the country of habitual residence, for whatever reason, may be incapable or unwilling to give the child adequate protection.

Id.

The cases that have addressed whether the removing parent has established the Article 13b "grave risk" exception by clear and convincing evidence demonstrate that this exception is truly to be narrowly construed. *Nunez-Escudero v. Tice-Menley, 58 F.3d 374, 376 (8th Cir. 1995).*

In Nunez-Escudero, the mother, in opposing the return of her child to the father in Mexico, argued that there was a grave risk that the child's return to Mexico would subject him to physical or psychological harm or would place him in an intolerable situation. In support, she submitted evidence that, while in Mexico, she had been physically, sexually and verbally abused by her husband, the father of the child. She also stated that she feared for the child's safety because her husband refused to purchase a car seat for the child. She also offered evidence that her father-in-law was verbally abusive and that she had seen him hit his youngest son. The appellate court rejected the mother's "grave risk" argument, stating "the evidence is general and concerns the problems between [the mother], her husband and father-in-law." *Id. at 377.* In reversing and

remanding, the Eighth Circuit instructed the district court "not to consider evidence relevant to custody or the best interests of the child," and clarified that the "Article 13b inquiry must encompass some evaluation of the people and circumstances awaiting that child in the country of his habitual residence." *Id. at 378.*

In an earlier Eighth Circuit case, *Rydder v. Rydder, 49 F.3d 369 (8th Cir. 1995),* the court affirmed the district court's determination that the mother had not shown the existence of a "grave risk" by clear and convincing evidence. The mother had pointed to "no specific evidence of potential harm" to the children, relying merely on journal articles that concluded that separating a child from the primary caretaker creates a risk of psychological harm. *Rydder, 49 F.3d at 373.*

In *Tabacchi v. Harrison, 2000 WL 190576* (N.D. Ill. Feb. 10, 2000), the respondent offered evidence of her husband's history of repeated physical and verbal abuse towards her, including incidents where her husband slapped her, hit her on the head, grabbed her and threw her to the ground, allegedly choked her, and hit her in the face with his arm. The court found that, on the two occasions that the child was present during altercations between the parents, the child was not harmed. Furthermore, the court found that the father never struck the child and only yelled at the child, as the mother did, when the child disobeyed. The court found that, based upon the evidence offered by the mother, the primary risk of harm was to the mother and not to the child. While emphasizing that "[the husband's] behavior toward his wife is unacceptable, to qualify as a

grave risk of harm under the convention, the risk must be to the child." *Tabacchi, 2000 WL 190576,* at *13.

In *Janakakis-Kostun v. Janakakis, 6 S.W.3d 843, 850 (Ky.Ct.App. 1999),* the court found that the respondent had failed to satisfy her Article 13b burden despite her evidence that, during a "violent rage," her husband had pushed her and the child to the floor, that her husband had pulled her hair such that he caused her to be hospitalized with severe neck injuries, that her husband regularly punished the child by "giving her a smack on the back," and that her husband had, on one occasion, torn up the child's passport. The respondent had also offered evidence from a psychologist that the child suffered from post-traumatic stress syndrome, had probably been sexually, physically and emotionally abused, and suffered from neglect. Despite this evidence, the court found that "there is absolutely no competent evidence before the Court that [the child] has been abused or neglected by [the father], or that [the child] faces certain danger in Greece. Likewise, there is no evidence that the courts in Greece cannot protect [the child]." *Janakakis-Kostun v. Application of Emmanuel, 6 S.W.3d 843, 850-51.*

In *Currier v. Currier, 845 F. Supp. 916 (D.N.H. 1994),* the district court held that the return of the children would not place them in grave risk of harm and ordered their return to Germany. The father of the children had argued that their mother was depressed and estranged from her parents, but the court found that "there was no evidence she ever failed the children or placed them in actual danger." *Currier, 845 F. Supp. at 923.* The court noted that

"while this court is required to 'evaluate the surroundings to which the [children are] to be sent and the basic personal qualities of those located there,' the court's focus is limited to the grave risk, if any, that situation seriously presents for the children." Id. (citing *Tahan, 613 A.2d at 486).* The court found "no credible evidence raising any serious doubt about the safety, propriety, or nurturing character of the German environment to which the children would return." Id.

And finally, in *Steffen F. v. Severina P., 966 F. Supp. 922 (D. Ariz. 1997),* the mother, opposing the father's petition for return of the child to Germany, argued that there was a grave risk of harm because the father had molested her daughter by a prior relationship. The court rejected the mother's argument, finding that there was no evidence that the child to be returned had been molested. Although the court found that it was "highly probable" that the mother's daughter had been sexually abused in the past, the court found that the mother had not "shown by clear and convincing evidence that [the father] was responsible for that abuse." *Steffen F., 966 F. Supp. at 926.* Thus, the court could not infer that there was a risk of physical harm to the child if he were returned to the father or that the father was an unfit parent.[44]

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[44] The court did find that there would be a grave risk of psychological harm to the child if he were returned to the father because the child had bonded and attached to the mother. See *Steffen F., 966 F. Supp. at 927-28.* This basis for applying the Article 13b exception is clearly not applicable to this case.

Indeed, the few cases that have denied a petition for return on the basis of the "grave risk" exception have generally emphasized that there was clear and convincing evidence to support a finding that the parent seeking the return had seriously abused the child. For example, in *Rodriguez v. Rodriguez, 33 F. Supp. 2d 456, 459-61 (D. Md. 1999),* the district court denied the petition for return of three children to Venezuela where there was extensive evidence of physical and psychological abuse of the oldest child and the mother by the father who sought the return. In that case, the oldest child, who was 13 years old, testified that his father began to physically abuse him when he was six years old.[45] One such beating caused him to miss a week of school. During another incident, the father kicked the child in the back, hit him with his fists and told him that he could not tell anyone about the beating. The mother also testified about the physical and verbal abuse of the oldest child, including incidents in which the father punched him, hit him with a belt, and scratched his face. There was testimony that the father kept handguns in the house and would brandish the guns while drinking. A psychologist testified that the two oldest children and the mother suffered from post-traumatic stress disorder. See also *Blondin v. Dubois, 78 F. Supp. 2d 283, 285 (S.D.N.Y. 2000)* ("Blondin III") (court denied father's petition for return,

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[45] Although the middle child was not physically abused by the father, this child saw the physical abuse of the mother and her older brother and was "always afraid of misbehaving because she saw what happened to her brother." *Rodriguez, 33 F. Supp. 2d at 460.*

finding that father beat the daughter frequently and threatened her life, including incident where father twisted piece of electrical cord around her neck, and had also threatened to throw son out the window); *Walsh v. Walsh, 221 F.3d 204, 220 (1st Cir. 2000)* (court denied father's petition for return, finding, among other things, that father had repeatedly beaten 20-year-old son from prior relationship and younger children had frequently witnessed the father's violent assaults). But see *Panazatou v. Pantazatos, 1997 Conn. Super. LEXIS 2627, 1997 WL 614519* (Conn.Super. Sept. 24, 1997) (court issued interim decision, pending resolution of undertaking process between the parties, finding that mother had established "grave risk" exception based on testimony that separation of child from mother would cause psychological harm and based on the mother's fears of her husband's anger).

Of some importance to this court on the issue is the fact that, throughout the three years of grandparent visitation litigation in Illinois, the Levines never claimed that March was an unfit parent (Docket No. 40, March Declaration at P135, Ex. C at 8), nor did they seek custody. The facts supporting their present assertion of grave risk of harm to the children arising out of the disappearance of their daughter were all known to the Levines throughout this period, yet that allegation was not made. Their struggle centered on visitation rights. Now, however, having secured by default a civil wrongful death judgment against March, who has never been criminally charged in

connection with his wife's disappearance,[46] their contention that March killed their daughter somehow has taken on the dimension of child abuse. And they now have a judgment saying he killed her.

On October 30, 1996, Perry March filed a petition in the Probate Court for Davidson County, Tennessee seeking, among other things, the transfer of certain bank accounts held by Janet March to him. The Levines filed an intervening petition as the parents and next friends of Janet March and "as grandparents of the two children" opposing the transfer of any property to Perry March. *March v. Levine, 1999 Tenn. App. LEXIS 180, 1999 WL 140760,* at *1 (Tenn.Ct.App. Mar. 17, 1999). Although not clear from the record before this court, it appears that, in July 1999, the Levines then filed, as an amended intervening petition, a wrongful death claim against Perry March in the Probate Court, alleging that Perry March had killed Janet March, their daughter. See Docket No. 54, Levines' Affidavit, Ex. 1 at 2. March apparently did not cooperate in the discovery phase of that case[47] and, as a discovery sanction under Tennessee Rule of Civil Procedure 37.02(C), the court ordered his answer to the wrongful death claim stricken, found the allegations in the Levines' amended intervening petition alleging wrongful death to be thus uncontested and declared true and correct, entered judgment by default

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[46] See Docket No. 22 at P15.

[47] The court held that Perry March had been "a willfully disobedient party and has willfully disobeyed unambiguous, specific orders of this Court." (Docket No. 54, Levines' Affidavit, Ex. 1)

against March, and precluded him from presenting any testimony as to any defenses to the wrongful death claim contained in the amended intervening petition. (Docket No. 54, Levines' Affidavit, Ex. 1) In the accompanying Appendix to Judgment by Default and Findings of Fact, clearly prepared by the Levines' counsel, the court made twelve "factual findings" based upon no proof, among which were these:

2. Over time, beginning in 1990, Perry March became increasingly physically, verbally, and emotionally abusive toward Janet Levine March. ...

4. On August 15, 1996, after a heated argument, Perry March intentionally inflicted severe, physical harm and serious bodily injury on Janet Levine March. Perry March's intentional physical assault caused such severe bodily injury to Janet Levine March that she died. As a direct, proximate result of Perry March's violent and brutal act, Janet Levine March died on August 15, 1996 or very shortly thereafter. ...

(Docket No. 54, Levines' Affidavit, Ex. 1) On February 8, 2000, a jury was empaneled to hear proof on damages only proximately caused by Perry March, "who wrongfully, intentionally, recklessly, maliciously and fraudulently killed his wife." (Docket No. 54, Levines' Affidavit, Ex. 2) On April 25, 2000, a verdict was returned in favor of the Levines individually, as the next friends of Janet Gail March, and as the next friends of the minor children and for

their use and benefit, in the total amount of $ 113,500,000. Id. at 3.[48]

The Levines do not assert that the alleged abuse of Janet March by Perry March that began in 1990 or his alleged killing of her in 1996 took place in front of the children or that those acts were ever known to the children. Instead, they argue that his alleged killing of Janet "has deprived the Children forever of Janet's love, affection, attention, devotion and guidance." (Docket No. 54, Levines' Affidavit at P5) Much more is required under the case law to establish this exception of grave risk of harm to the children by clear and convincing evidence. See *Tabacchi, 2000 U.S. Dist. LEXIS 1518,* *44, *2000 WL 190576,* at *13 (although finding that the petitioner-father had repeatedly physically and verbally abused the respondent-mother, the court found the "grave risk" exception not established because, "under the convention, the risk must be to the child").

The Walsh case, relied upon by the respondents for this point, is distinguishable. Most importantly, in Walsh, the court was deciding whether to return the children to a *parent* in Ireland or leave them with the other *parent* in Massachusetts. The First Circuit reversed the district court, which did not apply the "grave risk" exception to these facts. The petitioning father, who sought the return of the children to Ireland, had a history of assaults, "bloody and severe," committed upon his wife, his children and other

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[48] March states that he filed a timely notice of appeal of that judgment on May 2, 2000. See Docket No. 40, March Declaration at P150, Ex. R.

persons, some "much younger than he." *Walsh, 221 F.3d at 220.* He even hauled his eight-year-old daughter into a "bloodied room" to witness the aftermath of a vicious fight with her half-brother and instructed her to tell her half-brother to leave. *Id. at 210, 222.* She was later diagnosed with post-traumatic stress disorder. *Id. at 211.* Nothing approaching these facts has even been alleged in this court by the Levines. And they misconstrue the appellate court's criticism of the district court's giving "insufficient weight to [the father's] chronic disobedience of court orders." *Id. at 219.* The court orders that the father disobeyed in Walsh were protective orders, enjoining him from threatening or using violence against his wife or "watching or besetting" her residence. *Id. at 210.* The district court had ordered the children returned to Ireland with specific "undertakings" agreed to by the father. See *Walsh v. Walsh, 31 F. Supp. 2d 200, 207 (D. Mass. 1998).* The appellate court apparently had little hope that the father would keep his promises, given his history of disobedience to protective orders. This court is not presented with a remotely similar situation.

The respondents also point to several surreptitiously tape-recorded telephone conversations[49] between March

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[49] According to the respondents, they tape-recorded the telephone conversations between the two minor children and the petitioner upon the suggestion of a police officer in the Metropolitan Nashville Police Department. See Docket No. 84 at 41. Petitioner has filed a Motion to Strike these tape-recorded telephone conversations (Docket No. 112), on the ground that there was no court authorization, he did not consent, and there is no evidence that the two minor children consented. The Levines have responded, asserting that, as guardians of the children, they

and his children on July 4, 2000 as evidence that there is a "grave risk" that the return of the minor children to Mexico will subject them to physical or psychological harm.[50] It is clear in what is labeled the "1st Conversation" that Perry March had just learned that, the day before, the Levines had filed a petition in the Juvenile Court for Davidson County, Tennessee, seeking permanent custody of the children. They also had secured a restraining order allowing the children to remain in the temporary custody of the Levines pending further hearings and enjoining the petitioner, the petitioner's father, Arthur March, and Carmen from all contact with the Levines and the children except "reasonable telephone contact and/or visitation that is strictly supervised by the Department of Children's Services and the Davidson County Police Department." (Docket No. 54, Levines' Affidavit, Ex. 13) March's worst nightmare has come true. (Docket No. 26, Ex. 5(c) at P11) "I have been telling you all along that when they get you down there they are going to try to file papers to keep you from me forever," he tells Samson. March is desperate and angry.[51] He is frustrated and hurt that Samson did not

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had sufficient grounds to vicariously consent on behalf of the children under *Pollock v. Pollock, 154 F.3d 601 (6th Cir. 1998)*. (Docket No. 119) The court finds this argument persuasive and, therefore, has considered these tape recordings.

[50] See Docket No. 84, Ex. 8 (filed under seal).

[51] March asserts in these telephone conversations with Samson that Lawrence Levine has not always called Samson to the telephone when March has called. He is certain that someone is listening in on or recording the calls. In one of the calls, someone alerts Carolyn Levine to the fact that Samson is talking to March and with a, "You can't call your dad now," she hangs up the

refuse to be taken from his Mexican school by the Levines and that, at some point, he has told Carmen that he was happy being able to see his friends in Nashville. He sometimes shouts at Samson, but never at Tzipora, with whom he is gentle and loving. This attempt to "steal" his children, coupled with his paranoia about what he perceives to be the boundless power and influence of the Levines (replete in the papers filed in this case) has driven him to the breaking point. He is demanding, abusive and controlling of Samson who, throughout, amazingly seems able to communicate an alliance with his father without really turning against his grandparents. It is these conversations that caused the court to conduct the *in camera* interviews with the children, a practice not uncommon in Hague Convention cases. See *Sheikh v. Cahill, 145 Misc. 2d 171, 546 N.Y.S.2d 517, 521-22 (N.Y. Sup. Ct. 1989); In re Nicholson, 1997 U.S. Dist. LEXIS 11301, 1997 WL 446432,* at *3-4 (D. Kan. July 7, 1997) See also Rania Nanos, The Views of a Child: Emerging Interpretation and Significance of the Child's Objection Defense under the Hague Child Abduction Convention, *22 BROOK. J. INT'L L. 437 (1996).*

Samson was interviewed first. He seemed happy, relaxed and forthcoming.[52] Samson appears to like all aspects of his life in Mexico (with the possible exception of

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phone.

[52] The children did not appear to have been pressured in any way prior to the interview. In the sealed Order scheduling the interview, the court requested that the Levines not let the children know the purpose of the interview. It is clear that they honored that instruction.

having to wear a uniform to school). He has learned the Spanish language and likes to speak it, he likes his school, the climate, and being with his grandfather, Arthur March, and he loves Carmen and her children. When asked if he is having nightmares, he stated that he was beginning to have them because he misses his dad and wants to go back to Mexico. This was the only point in the interview when Samson was close to tears. He stated that nothing about going back to Mexico makes him scared or nervous and that he is not afraid of anything or anyone there. When asked if his father ever hit him, he said only when he and his dad were fooling around. He seems totally unaware of his father's alleged business problems in Mexico and the alleged use of guns by his grandfather or anyone else and substantially unaware of the turmoil surrounding this case. Neither the court nor the licensed clinical psychologist who assisted the court noted signs of deception or causes for alarm during this interview.

Tzipora, who is six, likewise was relaxed during the interview. She can only be described as playful and delightful in every way. Throughout much of the interview, she was drawing a picture of a little girl thinking about hearts. She likes speaking Spanish, loves her house in Mexico, expressed enthusiastic affection for Carmen and referred to Carmen's children as her siblings. She likes living with her grandparents but misses her father. What she would most like is for her father and "especially Carmen" to come here so that she could hug them and her grandmother and grandfather at the same time. She is not afraid of anything here or in Mexico, but did have a scarey

dream about snakes in Mexico once and a bad dream in Nashville after her brother told her a scary story. She did state that Daddy spanks but her Mommy never did before she went away or died. Again, there were no signs of deception or cause for alarm in her interview.

The court's observations are bolstered by the statements in the Declaration of Wayne C. Palfrey, the Director of the Oak Hill Academy in Mexico.[53] Mr. Palfrey states that both children "did very well in school" and "were enjoyable, happy and engaging students." (Docket No. 78, Palfrey Declaration at P5) They "obtained a working and useful knowledge of Spanish, and they were successful in their course studies."[54] Id. at P6. Mr. Palfrey "consistently observed" the children in the presence of March and Carmen, who "had a constant dialogue with the children's teachers, and was very aware of their needs and schedules." Id. at PP10, 12. He states that Perry March was "concerned about his children's integration into the school," "highly attentive to his children and engaged in their progress and activities." Id. at PP7-8. He continues that the children had "a very strong bond to Carmen and their father" and that he "enthusiastically recommended Carmen's adoption of the children to the Jalisco Family Adoption Agency." Id. at PP13-14. Of particular relevance

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[53] The court requested and received verification from the State Department that this filing is the authentic declaration of Mr. Palfrey and was signed by him. (Docket Nos. 100-101)

[54] In his interview, Samson indicated that he did not know any Spanish before he moved to Mexico.

to the "grave risk of harm" inquiry are these observations made by Mr. Palfrey:

> 14. The children's school records do not reflect any abuse, neglect or negative treatment by either Perry or Carmen. There was never any Mexican government investigation of maltreatment or abuse of the children, to our knowledge.
>
> 15. I have no reason to believe, and no knowledge of any facts to indicate, that the March children were the subject of any physical or psychological abuse, or were in any danger here at all. Their family situation here in Jalisco was, to my knowledge, and the knowledge of my staff, loving, normal and happy.
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> 16. To my knowledge, Sammy and Tzipi had a normal social life, and we never received any reports from the families of other students reflecting adversely on the March children or their parents.
>
> 17. We are aware that the children took vacations as a family.

Id. at PP14-17. Mr. Palfrey states that he "personally asked the Levines to allow the children to finish their last three days of school, and the Levines refused me." Id. at P24.

Pursuant to *22 C.F.R. § 94.6(f)*[55] and in the interest of evaluating "the surroundings to which the child is to be sent and the basic personal qualities of those located there," see *Tahan, 259 N.J. Super. at 335*, this court requested through the United States State Department that the Mexican social service agency conduct a home study of the Perry March home, including Carmen and her children. (Docket Nos. 122-23) This request was made on August 11, 2000, eight days after the filing of this case. No direct response has come to that request but, on August 28, 2000, the court was furnished[56] with the substantial equivalent of what was requested, apparently completed in connection with Carmen's application to adopt the children.[57] The report was written on August 14, 2000 by Maria Elena Rivera Hernandez, a social worker, and Abraham Beltran Alatorre, Deputy of the Children and Family Defense General Attorney, both of the Chapala DIF System,[58] after

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[55] *22 C.F.R. § 94.6(f)* provides that the National Center for Missing and Exploited Children shall "upon request, seek from foreign Central Authorities information relating to the social background of the child ...."

[56] The report was submitted to this court by Henry Segura of the National Center for Missing and Exploited Children, which works closely with the State Department in these cases. He received it from Rosa Isela Guerrero Alba of the Mexican Central Authority for Child Abduction. (Docket Nos. 29-30) The respondents have not challenged the authenticity of this report or the certified translation submitted with it.

[57] The court was informed of this fact by Ms. Marty J. Haas of the United States State Department in a telephone call on September 12, 2000.

[58] The DIF System refers to the Municipal System of Family Whole Development, seemingly the equivalent of our social

these two individuals conducted a home visit at the March residence. These individuals state that the March children "lived a harmonious and normal life with their parents, Mr. Perry A. March and his wife, Mrs. Carmen Rojas de March." (Docket No. 30) Noting that Carmen's three children also live at the residence, they state, "All of them made up the family, all were in good health and protected by the parents, and enjoyed the safety of the Sub-Division they lived at which has private security." Id. The report continues, "It has been observed that the children have always received family orientation, additionally to the love of their father and that of Mrs. Carmen Rojas. Likewise, the parents' behavior is good; this agency has not received [any] claim as to the opposite nor regarding mistreatment of the children." Id.

The court's *in camera* interviews with the children, the Declaration of Mr. Palfrey and the social services report are all in stark contrast to the picture of life in Mexico for the March children painted by the Levines in their filings with this court. The joint Affidavit of the Levines and its exhibits (Docket No. 54) contain most of what they allege, although their assertions are repeated throughout their papers.

According to the Levines, March is engaged in shady business dealings and living in a bigamous relationship with Carmen. He and his gun-toting father have threatened the Levines, their family and lots of other people. Numerous arrest warrants have been issued in

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services department.

Mexico, and he and the children are about to be deported from Mexico.

March, of course, disputes most of this. He claims that his troubles in Mexico began in 1999 when anonymous packages of video news clips and newspaper clippings about his allegedly killing his wife started arriving in the town where he lives. Letters of complaint against him were filed with immigration officials, requesting he be expelled from the country. March lays all of this at the feet of the Levines, whom he claims stirred up all the trouble and "poisoned the well" in his new home with their accusations. See Docket No. 40, March Declaration at 14-17.

This court has twice requested information from the U.S. State Department about the alleged deportation proceedings against Perry March. (Docket Nos. 124-25) No information has yet been forthcoming. This court, in its *in camera* interview of Samson, asked him about the presence of guns in Mexico. He stated that he had not seen any guns. Whatever business problems March may be having, whether or not the Levines have contributed to them, have had no effect on the children, so far as this court can determine.

The Levines have submitted copies of three criminal complaints lodged against March in Mexico. See Docket No. 90. Ms. Tove Lindemann Midtun alleges in the first one, filed December 3, 1999, that March threatened her life "through a close friend" for defaming him and spreading information she had no knowledge of. (Docket No. 90, Ex. 1) March claims that (1) Ms. Midtun is an "agent/friend of the Levines;" and (2) he provided alibi

information to the authorities and the complaint was dismissed. (Docket No. 40, March Declaration at PP106-7) The second complaint was lodged by Peggy Jo Turner on April 14, 2000. She alleged that, on January 14, 2000, when she was at Perry March's office on business, he threatened to "take care of her" if she did not "shut her mouth." (Docket No. 90, Ex. 2) The third complaint was filed by Joel Nelson Rasmussen on August 21, 2000. He alleges that, on August 20, 2000, after he attempted to serve papers on March while March was eating at a restaurant with Carmen and her children, March drove past him and gestured a "death threat" by drawing his finger across his throat. (Docket No. 90, Ex. 3) March has filed a copy of an assault complaint he has filed against Mr. Rasmussen in connection with the events on August 20, 2000, in which he claims Rasmussen attacked him and Carmen in front of Carmen's children. (Docket No. 40, March Declaration at PP144-45, Ex. Q) March maintains that Turner and Rasmussen are among the Levines' "agents" who were "constantly trying to cause us problems, calling me 'killer,' following Carmen, taking pictures of all of us." Id. at P103.

None of these complaints alleges anything improper taking place in the presence of the March children. The March children do not appear to be aware that there are arrest warrants out for their father. None of these complaints has yet resulted in the arrest of Perry March. There is an arrest warrant outstanding for the Levines as well in Mexico, secured by March, on the charge of kidnapping his children. (Docket No. 40, Ex. B) The court

cannot find that these outstanding criminal complaints establish by clear and convincing evidence a grave risk of harm to the March children, should they be returned to Mexico.

The Levines also rely on the Report of Guardian ad Litem Redina Friedman, a lawyer appointed by the Chicago court to represent the March children. (Docket No. 54, Ex. 10) Her report was filed July 19, 2000, after the Levines had filed papers in the Davidson County Juvenile Court seeking custody of the March children. Ms. Friedman's report urges the Chicago judge to cede jurisdiction to the Davidson County court, since the Levines and the children (now) are there, and March no longer lives in Illinois. Ms. Friedman states that she has spent "approximately 8 hours with the children and the LEVINES in Tennessee" and "believe[s] that PERRY is emotionally abusing the children and is an unfit parent." (Docket No. 54, Ex. 10 at 3) She states that March has "recently" enrolled the children in a private school in Mexico, Id. at 4, which, according to the undisputed evidence, is inaccurate. She states that the March children "do not seem particularly bonded with [Carmen's] children as step-siblings" and do not express their love for Carmen or the fact that they miss her "of their own volition." Id. These impressions are totally at odds with this court's impressions formed during the *in camera* interviews with the March children. Ms. Friedman, who is a lawyer, not a psychologist or social worker, does not state that she ever spoke to the children out of the presence of the Levines, as did this court, and it is clear that no licensed clinical psychologist was present with her to pick up cues

regarding deception or psychological disturbance not obvious to a layperson, as was the case with this court's interview. The court must view Ms. Friedman's report as unduly influenced by the Levines and gives it little weight.

Even if this court were to find that the Levines established the grave risk exception, much of the case law under the Hague Convention would mandate the return of the children to their father in Mexico anyway.

In *Blondin v. Dubois, 189 F.3d 240 (2d Cir. 1999)* ("Blondin II"), the Second Circuit held that, while there was evidence that supported the district court's factual determination that returning the children to the father's custody would expose them to "grave risk" of physical harm, remand to the district court was necessary for further consideration of the possible remedies that would allow the children to be returned to their habitual residence and ensure their safety while the court in the country of the children's habitual residence made a custody determination.[59] See also *Friedrich II, 78 F.3d at 1067*

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[59] On remand, the district court again concluded that the return of the children to the father in France would present a grave risk of exposure to physical or psychological harm. The court found that the French courts could not adequately protect the children and observed that there was "attempted intimidation of [the mother] and this Court by the French authorities." *Blondin III, 78 F. Supp. 2d at 297.* This case is clearly distinguishable. The district court in Blondin III found that the father had physically abused one of the children, that this child suffered from an "acute, severe traumatic disorder" as a result of the father's physical and verbal abuse of her and her mother, and that this child objected to being returned to her father in France. In the March case, there is no evidence of physical abuse of the children by March, and

("[A] federal court retains, and should use when appropriate, the discretion to return a child, despite the existence of a defense, if return would further the aims of the Convention."); *Walsh, 221 F.3d at 219* ("A potential grave risk of harm can, at times, be mitigated sufficiently by the acceptance of undertakings and sufficient guarantees of performance of those undertakings."); *Turner v. Frowein, 253 Conn. 312, 752 A.2d 955, 974 (Conn. 2000)* (although court found that there was sufficient evidence that the father had sexually abused son, court remanded to trial court and ordered trial court to "consider the range of placement options and enforceable remedies that might facilitate the child's safe return pending a custody award in due course by the home court with proper jurisdiction").

On March 21, 2000, respondent Lawrence Levine addressed the Tennessee House of Representatives Committee on Children and Family Affairs[60] concerning certain proposed amendments to Tennessee law.[61] When

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Samson does not object to being returned. Furthermore, there is no indication in the record that the Mexican courts or governmental agencies would be unwilling or incapable of protecting the children, should that be necessary.

[60] The committee hearings also indicate that Mr. Levine had previously addressed a House Subcommittee, presumably the Subcommittee on Domestic Relations.

[61] In his Petition, March alleged that the Levines "persuaded" the General Assembly of Tennessee to enact into law the "March amendments" to Tenn. Code Ann. § § 36-1-113 and 36-6-106. (Docket No. 1 at P40) In their Answer, the Levines admitted that these laws were passed "without a single dissenting vote" but denied that they were instrumental in the passage of these amendments. (Docket No. 22 at P40) The legislative history reveals otherwise.

asked by the chair of the committee why this bill was needed, Mr. Levine stated, "Janet March was murdered by her husband and we've got a civil judgment stating that he wrongfully and intentionally murdered my daughter. My grandchildren are living with the murderer right now down in Mexico and, if by some miracle they were ever to come back to the State of Tennessee, I would like the law to be very clear that I have a right to come and ask to take away their custody from the murderer."[62]

Mr. Levine's statements in this legislative committee meeting are revealing of the motivation behind the Levines' attempt to persuade this court that the return of the children to their father would subject them to a serious risk of harm. At bottom, the serious risk of harm to these children, in the eyes of the Levines, is that they are being raised by the man they firmly believe murdered their daughter. To the Levines, being raised by a father whom the Levines believe to be a murderer is as abusive to these children as regular beatings or sexual abuse would be. This is not difficult to understand; indeed, surely most grandparents, believing what the Levines believe to be true, would feel the same way. However, this allegation does not meet the high standard required under the Hague Convention.

The Levines have not carried their burden of establishing a serious risk of harm to these children by clear and convincing evidence under the Hague Convention or

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[62] Hearing on HB 2644 before the House Committee on Children and Family Affairs, 101st General Assembly, 2d Reg. Sess. (Tenn. 2000) (statement of Lawrence E. Levine).

the cases decided pursuant to it. Therefore, if the remaining grounds upon which the Levines rely are not sustained by this court, it is the courts of Mexico, the habitual residence of the March children, to which the Levines will have to apply if they wish to seek custody of their grandchildren.[63]

2. *Human Rights and International Freedoms*

The respondents also seek to establish that the minor children should not be returned to Mexico, the children's habitual residence, because to do so would violate "human rights and international freedoms." (Docket No. 22 at 5) Specifically, the respondents assert that

> given the death threats to the Levines, March's killing of Janet, and March's threats to others in Mexico, it is unsafe to try this case in Mexico. Due process and a fair trial are fundamental principles of the United States of America relating to the protection of human rights and international freedoms. The Levines cannot receive due process or a fair trial in Mexico, largely because of March's conduct.

Id.

Under Article 20 of the Hague Convention, "the return of the child ... may be refused if this would not be

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[63] Hague Convention, art. 19; *51 Fed. Reg. at 10511*, Section III. J.1 ("Once the factual status quo has been restored, litigation concerning custody or visitation issues could proceed. Typically this will occur in the child's State of habitual residence.").

permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms." Hague Convention, art. 20. There is little case law in the United States focusing on this provision. However, the State Department explains that "it should be emphasized that this exception, like the others, was intended to be restrictively interpreted and applied, and is not to be used, for example, as a vehicle for litigating custody on the merits or for passing judgment on the political system of the country from which the child was removed." *51 Fed. Reg. at 10510.* See also Elisa Perez-Vera, Explanatory Report: Hague Convention on Private International Law 426, 462 P118 (1981)[64] ("So as to be able to refuse to return a child on the basis of this article, it will be necessary to show that the fundamental principles of the requested State concerning the subject-matter of the Convention do not permit it; it will not be sufficient to show merely that its return would be incompatible, even manifestly incompatible, with these principles.").

In Freier, the court granted the father's petition, finding that the mother's removal of the minor child from Israel was wrongful under the ICARA and, among other things, the return of the children would not violate the fundamental right to travel under the United States Constitution of either the mother or the minor child.

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[64] Elizabeth Perez-Vera, Explanatory Report: Hague Convention on Private International Law (1981) obtained at www.hcch.net. The Perez-Vera Report served as "the official history and commentary on the Convention and is a source of background on the meaning of the provisions of the Convention available to all States becoming parties to it." *51 Fed. Reg. at 10503.*

Although the father had secured an injunction prohibiting the mother from leaving Israel until the divorce and custody proceedings were settled, the court found that the mother had a due process right under Israeli law to challenge the injunction. The court rejected the mother's argument that the return would violate Article 20 of the Convention because it was satisfied that the mother's "human rights and fundamental freedoms are not in jeopardy and are protected by the due process available in the civil and Rabbinical courts of Israel."[65] *Freier, 969 F. Supp. at 444.*

Here, the respondents have not pointed to any action by the Mexican government or the courts that demonstrates that they would be denied due process of law or would be denied a fair trial if the children are returned to Mexico. Indeed, it appears to the court that the respondents have been able to negotiate the Mexican legal system fairly well in that they were able to secure a court order to enforce the Illinois visitation order and even got a judge to accompany them to the children's school to enforce it. (Docket No. 85 at PP3-5) There is no clear evidence that the rights of the Levines or, more importantly, the rights of the minor children, would not be protected in Mexico. The court, therefore, finds that the respondents have failed to satisfy their burden.

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[65] In reaching this conclusion, the court noted that it had focused on the mother's rights "even though it is not clear that the Hague Convention's focus under Article 20 is on the parents' rights as opposed to the child's rights." *Freier, 969 F. Supp. at 444.* The court was satisfied that the minor child's due process rights would be protected in Israel.

G. *Fugitive Disentitlement Doctrine*

The respondents have moved to dismiss March's petition on the basis of the "fugitive disentitlement doctrine". (Docket No. 51) The respondents argue that March is not entitled to bring this petition because he is "a fugitive from at least two arrest warrants arising out of criminal contempt orders issued in the Probate Court for Davidson County, Tennessee and the Circuit Court for Cook County, Illinois ...." (Docket No. 52 at 1)

The history of these contempt orders in the various proceedings is as follows. On October 18, 1996, approximately a month after March moved with the children to Illinois (Docket No. 40, Ex. C at 2), the Levines filed a petition for grandparent visitation under the Illinois Marriage and Dissolution of Marriage Act in the Circuit Court for Cook County (Chicago), Illinois. (Docket No. 84, Ex. 4) The Levines were first awarded visitation with the March children on December 11, 1996, but this visitation order was vacated on June 30, 1998. (Docket No. 40, Ex. C at 3) The Appellate Court of Illinois vacated the court's grandparent visitation order, finding that it was issued in violation of March's right to due process and that "the trial court granted the grandparents equal, if not superior, rights to visitation over Perry, their natural father. This is not the intent of the grandparental visitation statute." (Docket No. 40, Ex. C at 18-21) The court further found that "the visitation order interferes with Perry's rights as the natural father and equates the rights of the Levines with those of Perry. The order provides an overly generous visitation schedule to the Levines, Perry's in-laws, based only on their

own testimony." Id. at 23. The appellate court also vacated the injunction preventing March from removing the children from Illinois, finding that the "required elements of proof were not met" (Id. at 27), and vacated the order providing for "personal retention of the case by a specific trial judge" (Id. at 28).

The contempt order against Perry March stems from a series of orders that were entered after March had moved to Mexico with his children.[66] The first contempt order was entered by the Circuit Court of Cook County, Illinois on August 13, 1999, holding March "in indirect civil contempt for wilfully violating this court's order of July 6, 1999." (Docket No. 26, Ex. 4(c)) The July 6, 1999 order provided that the Levines were to have telephone contact with the March children, who had been moved to Mexico, and ordered Perry March to provide, at all times, a telephone number for the children. (Docket No. 26, Ex. 6(c)) On August 18, 1999, the court entered an order finding March in "direct criminal contempt" for failing to appear in court as ordered on August 13, 1999 and August 16, 1999 and for

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[66] On May 28, 1999, when only March's lawyer appeared, with motion to dismiss in hand, for a hearing on temporary visitation, the Circuit Court of Cook County, Illinois, entered an order requiring, among other things, that Perry March appear in court with the children on June 3, 1999. (Docket No. 26, Ex. 1(b)) On June 9, 1999, the Circuit Court for Cook County, Illinois, again entered an order requiring Perry March to produce the children on June 10, 1999, and ordered grandparent visitation, apparently based upon the testimony of the Levines, who "believe that Perry March was responsible for Janet March's death," and some information from the guardian ad litem. (Docket No. 26, Ex. 1(c))

failing to have his two minor children appear in court as ordered on August 16, 1999. (Docket No. 26, Ex. 4(d))

The court does not discount the import of these contempt orders and does not ignore the fact that March left Illinois for Mexico during the pendency of the grandparent visitation proceedings. But the Levines can point to no court order in the Illinois proceeding that prevented March from leaving the state.[67] Moreover, March was not in contempt of any court orders at the time he moved to Mexico.

The respondents also contend that "March's tactic of preemptive flight cannot shield March from application of the fugitive disentitlement doctrine." (Docket No. 52 at 9) In support, the respondents rely on cases in which "U.S. appellate courts have held that defendants with proper notice of hearings in on-going litigation cannot flee prior to

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[67] The Levines rely on the original summons, which states that the parties to any action brought under the Illinois Marriage and Dissolution of Marriage Act are not permitted to remove the children until a final judgment in the action without order of the court or consent of the parties. See Docket No. 84, Ex. 4. Despite this "form injunction," on December 11, 1996, the Circuit Court for Cook County, Illinois, entered an order enjoining March from removing the children from Illinois. (Docket No. 40, Ex. C at 3) This injunction order was vacated by the Appellate Court of Illinois on June 30, 1998. (Docket No. 40, Ex. C at 28) See also Docket No. 84, Response to Petitioner's Statement of Undisputed Facts No. 13 (The Levines admit that in June 1998 the Illinois Court of Appeals reversed and vacated a trial court order which had prohibited March from leaving Illinois with the Children ...."). Clearly the "form injunction" on the summons is of little import if the trial court felt it necessary to issue a specific one and the appellate court vacated the specific injunction without

the hearing and then, as a fugitive, challenge the results of the hearing." Id. (citing *Empire Blue Cross and Blue Shield v. Finkelstein, 111 F.3d 278 (2d Cir. 1997)* and *United States v. Barnette, 129 F.3d 1179 (11th Cir. 1997)).*

These cases are inapposite. In Finkelstein, the fugitive civil litigants sought to appeal the judgment entered against them in a RICO and common law fraud action. In Barnette, the fugitives sought to appeal the court's finding that they were in civil contempt. Here, the petitioner is not seeking in this ICARA action to challenge the results of a hearing of which he had notice before he moved to Mexico. Before he moved to Mexico, there was a pending grandparent visitation petition. This ICARA action does not seek to challenge any award of grandparent visitation, the wrongful death award, or the contempt findings in the Probate Court.

The respondents also point to the findings of contempt issued by the Probate Court for Davidson County, Tennessee. Here, the court finds that, although the parties to the probate action and this action are the same, there is little nexus between these cases.[68] See *Ortega-Rodriguez v.*

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even referring to the "form injunction" on the summons form.

[68] The respondents assert that In re Prevot demonstrates that no nexus is necessary in an ICARA case. See Docket No. 52 at 17. But the court in In re Prevot specifically found, after discussing Ortega-Rodriguez, that a nexus was present. See *In re Prevot v. Prevot, 59 F.3d 556, 566-67.* But see *Walsh, 221 F.3d at 215* (finding the Sixth Circuit's analysis "too slim a reed to support so weighty a doctrine").

Regardless, while the court does not find the required connection between the probate matter and this case, there is a sufficient nexus between the grandparent visitation proceedings and this

United States, 507 U.S. 234, 113 S. Ct. 1199, 122 L. Ed. 2d 581 (1993) (holding that there needs to be a connection between fugitivity and the proceedings from which the fugitive is to be disentitled from participating in).

The finding of contempt by the Probate Court stemmed from the petitioner's failure to return a "cross-stitched baby quilt hand sewn by the mother of Carolyn Levine when she was pregnant with Janet March and the beaded bag and the repairs that were required to be made to furniture of the Levines ...." (Docket No. 52, Ex. 5 at 2) On March 27, 2000, the court found March to "be in further direct contempt of this court for his failure to obey the orders of this Court by his willful, habitual and unjustified failure to perform the acts above enumerated and to deliver the items and do the things he was commanded to do in Order of this Court of July 15, 1998."[69] Id. The court ordered March jailed. Again, the court does not take lightly March's failure to follow the orders of the Probate Court. However, to preclude him from bringing this ICARA action as a result of this finding of contempt concerning his failure to return and repair personal property of the respondents is far too harsh.

ICARA proceeding, so this doctrine must be discussed.

[69] There are two earlier contempt findings against the petitioner relating to March's failure to return certain items to the Levines, including the baby quilt and beaded bag. (Docket No. 26, Ex. 4(f)) On July 15, 1998, the court found March in contempt and ordered him to pay legal fees, costs, and moving and transportation expenses incurred by the Levines. Id. at 7. On January 20, 1999, the court found March in contempt and ordered him to pay a fine of $ 50.00 per day, beginning January

In Walsh, the First Circuit recently addressed the applicability of the fugitive disentitlement doctrine in an ICARA case. The First Circuit denied the father's petition under the "grave risk" exception but declined to apply the fugitive disentitlement doctrine to dismiss the father's petition. In reaching its conclusion, the court relied on the rationales articulated by the United States Supreme Court in *Degen v. United States, 517 U.S. 820, 116 S. Ct. 1777, 135 L. Ed. 2d 102 (1996).* In Degen, the Supreme Court, in an unanimous decision, held that the fugitive disentitlement doctrine does not permit a court "in a civil forfeiture suit to enter judgment against a claimant because he is a fugitive from, or otherwise is resisting, a related criminal prosecution." *Degen, 517 U.S. at 823.* As the respondents point out, in so holding, the Supreme Court identified five rationales for the application of the fugitive disentitlement doctrine in civil cases against a fugitive: "1) the risk of delay or frustration in determining the merits of the claim; 2) the unenforceability of the judgment; 3) the compromising of a criminal case by the use of civil discovery mechanisms; 4) the indignity visited on the court; and 5) deterrence."[70] *Walsh, 221 F.3d at 215* (citing *Degen, 517 U.S. at 825-28).*

5, 1999. (Docket No. 26, Ex. 4(g))

[70] In a post-Degen case, the Seventh Circuit characterized the rationales advanced in Degen as "shifting the emphasis from considerations of dignity, deterrence, respect, propriety, and symmetry found in a number of earlier [fugitive disentitlement] cases ... to the kind of practical considerations that inform the decision whether to dismiss a suit with prejudice as a sanction for mistakes, omissions, or misconduct." *Sarlund v. Anderson,*

The respondents rely heavily on the Sixth Circuit's opinion in *In re Prevot, 59 F.3d 556 (6th Cir. 1995),* decided before the Supreme Court's decision in Degen, in which the Sixth Circuit dismissed an ICARA petition under the fugitive disentitlement doctrine. The petitioner in that case, Mr. Prevot, a French citizen, had pleaded guilty to a felony theft charge in Texas. He was given 10 years' probation, provided that he make monthly restitution payments and pay a monthly probation officer's fee. Seeking to avoid his probation obligations, Mr. Prevot left for France with his wife and children in violation of the terms of his probation. At some point, his wife brought the children back to the United States to live. Mr. Prevot then filed a petition under the ICARA for the return of the children to France.

The Sixth Circuit found that the fugitive disentitlement doctrine denied Mr. Prevot the right to bring his ICARA action. But In re Prevot is distinguishable and does not control the outcome of this case. In In re Prevot, the petitioner had been convicted of a criminal felony charge, he fled "to escape his criminal conviction and other responsibilities to court, probation officers, victim and government ...." *In re Prevot, 59 F.3d at 567.* These were important obligations of Mr. Prevot before he left the United States that the Court felt strongly he ought not be able to dodge by leaving the country:

> Because of the unique facts, the core of this case is not custody, or competing interests of parents, but

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205 F.3d 973, 974 (7th Cir. 2000).

> fundamental concerns of how the United States operates its courts and how those courts may react to abuses of American criminal process, to defiance of judicially-imposed obligations owed to victims of crime, and to flights from financial responsibilities to our government.

Id. at 566.

Furthermore, this court agrees with the reasoning in Walsh that "applying the fugitive disentitlement doctrine would impose too severe a sanction in a case involving parental rights." *Walsh, 221 F.3d at 216.* Relying on the Supreme Court's recent decision in *Troxel v. Granville, 530 U.S. 57, 120 S. Ct. 2054, 147 L. Ed. 2d 49 (2000),*[71] the court affirmed that "parenthood is one of the greatest joys and privileges of life, and, under the Constitution, parents have a fundamental interest in their relationships with their children." Id. (citing *Troxel, 120 S. Ct. at 2060* ("The

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[71] In Troxel, the paternal grandparents petitioned for visitation with children after the death of the children's father under the state of Washington's statute that allowed "any person" to petition the state court for visitation, which would be ordered if the court found that visitation would serve the best interests of the child. A plurality of the Supreme Court held that the statute as applied violated the due process rights of the mother because the court granted the paternal grandparents court-ordered visitation in excess of what the mother deemed to be appropriate, based on the court's disagreement with the mother as to whether the increased visitation with the paternal grandparents would benefit the children.

liberty interest at issue in this case--the interest of parents in the care, custody, and control of their children--is perhaps the oldest of the fundamental liberty interests recognized by this Court.").[72] The First Circuit continued, "to bar a parent who has lost a child from even arguing that the child was wrongfully removed to another country is too harsh. It is too harsh particularly in the absence of any showing that the fugitive status has impaired the rights of the other parent." *Walsh, 221 F.3d at 216.* The other party here is not the other parent, and March's absence from this country has worked entirely in favor of the Levines, who have gotten numerous courts to grant unopposed relief in their favor on a variety of issues.

The rationales cited in Degen for the application of the fugitive disentitlement doctrine do not apply to this case. First, the risk of the unenforceability of a judgment is not an appropriate consideration in this case. The respondents argue that

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[72] See also cases cited in *Troxel, 120 S. Ct. at 2060,* emphasizing the nature of the liberty interest of parents in the care, custody, and control of their children, including *Meyer v. Nebraska, 262 U.S. 390, 67 L. Ed. 1042, 43 S. Ct. 625 (1923)* (liberty interest includes the right of parents to "establish a home and bring up children" and "to control the education of their own"); *Pierce v. Society of Sisters, 268 U.S. 510, 69 L. Ed. 1070, 45 S. Ct. 571 (1925)* (liberty interest includes the right "to direct the upbringing and education under their control"); *Prince v. Massachusetts, 321 U.S. 158, 88 L. Ed. 645, 64 S. Ct. 438 (1944)* ("it is cardinal with us that the custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder.").

the subject at issue -- two small children -- are presently in the United States and subject to the full protection of our courts. If the custody case[73] is tried in the United States, March will receive the full panoply of due process, and, no matter who prevails, the courts will be able to enforce their judgment and award the children to the proper party. If the children are sent to Mexico, the United States courts have no control over the proceedings to ensure justice.
(Docket No. 52 at 12) This court has faith that Mexico, the children's habitual residence, is as capable as the United States to enforce a judgment in any custody proceeding.

Next, the court must consider whether the fugitive disentitlement doctrine should be applied in this case to protect the dignity of the court. In Degen, the court was confronted with "the spectacle of a criminal defendant reposing in Switzerland, beyond the reach of our criminal courts, while at the same time mailing papers to the court in a related civil action and expecting them to be honored." *Degen, 517 U.S. at 828.* Yet the Court held that striking his claims and entering summary judgment against him was too severe a sanction. The "criminal defendant" in Degen had been indicted by a federal grand jury for distributing marijuana, laundering money and "related crimes." *Id. at 821.* The Court allowed him to contest from afar the civil

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[73] The respondents claim that March is a fugitive based on the fact that he moved to Mexico during the pendency of their petition for grandparent visitation. It is they who have upped the ante. Only after they removed the children to Nashville under a visitation order did they file a petition for termination of March's parental rights and custody. There is a world of difference between grandparent visitation and custody.

forfeiture action brought against him in connection with the very criminal charges he refused to return to face. If those facts do not offend the Supreme Court's sense of protecting the dignity of the court, the facts of this case cannot be found to do so.

The risk of delay or frustration in determining the merits of the claim is something the respondents have brought upon themselves. Instead of seeking custody of the March children in the courts of Mexico, as the Hague Convention dictates, they chose to retain them in Nashville and exploit their "home court advantage."

The fourth rationale articulated by the Degen court is whether a criminal case might be compromised by the fugitive's participation in the civil action. See *Degen, 517 U.S. at 825-26.* In Degen, the government was concerned that the fugitive "might use the rules of civil discovery in the [civil] forfeiture suit to gain an improper advantage in the criminal matter, prying into the prosecution's case in a manner not otherwise permitted." *Degen, 517 U.S. at 826.* Reliance on this rationale is misplaced. Degen had been indicted before he became a fugitive. See *116 S. Ct. at 1779.* See also *Walsh, 221 F.3d at 209* (Walsh was arraigned on a two-count criminal complaint, charging him with attempting to break and enter and threatening to kill another, before he became a fugitive); *In re Prevot, 59 F.3d at 559* (Prevot pleaded guilty to theft charge and was sentenced to 10 years' probation prior to becoming a fugitive). The petitioner in this case has not been indicted for the killing of Janet Gail March. While there may be an ongoing criminal investigation into her death, it would not

be appropriate for this court to apply the fugitive disentitlement doctrine where there has been no showing that the petitioner has been indicted. The court will not prevent the petitioner from asserting a claim in the court for the return of his minor children on the basis that he may, at some undisclosed future date, be indicted for the killing of his wife.[74]

Finally, the court must evaluate whether application of the fugitive disentitlement doctrine would be appropriate in order to deter individuals from becoming fugitives from justice. See *Degen, 517 U.S. at 828.* This court finds that disentitlement "is too blunt an instrument for advancing" this interest. Id. As the Supreme Court stated,

> it remains the case, however, that the sanction of disentitlement is most severe and so could disserve the dignitary purposes for which it is invoked. The dignity of a court derives from the respect accorded its judgments. That respect is eroded, not enhanced, by too free a recourse to rules foreclosing consideration of claims on the merits.

Id. Accordingly, the court finds that the rationales as advanced by the Supreme Court in Degen would not be

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[74] Even if the petitioner had been indicted, the court could decline to bar the petitioner from making his claim in court and, instead, take such actions as managing the discovery in the civil action in order not to jeopardize the criminal case. See *Degen, 517 U.S. at 826-27.*

advanced by application of the fugitive disentitlement doctrine in this case.

CONCLUSION

The court grants Petitioner March's petition for the return of his two minor children, Samson Leo March and Tzipora Josette March, to Mexico. As mandated by *42 U.S.C.A. § 11607*(b)(3), the respondents are ordered to pay all costs associated with the return of the children to Mexico, court costs and March's reasonable attorney's fees.

An appropriate Order will enter.

ALETA A. TRAUGER
United States District Judge

ORDER

Pursuant to the accompanying Memorandum, it is hereby [**90] **ORDERED** that the Respondents, Lawrence E. and Carolyn R. Levine, are to immediately return the minor children Samson Leo March and Tzipora Josette March to the Petitioner, Perry A. March, who is residing in Mexico. The children are to be flown, at the expense of the Respondents, to the Guadalajara, Mexico airport in the company of a family friend or lawyer to the Levines. No family member of the Levines is to accompany the children to Mexico. The Levines shall give written notice of the date, flight numbers and arrival time to the

Petitioner through his counsel, with a copy furnished to the court **UNDER SEAL** 24 hours in advance of the arrival of the children in Mexico. The Petitioner, Perry A. March, shall meet his children at the arrival gate for the designated flight, and custody is to be given to him at that time.

Recognizing that immediate return of the children to Mexico may effectively moot any appeal from this Order, this court, in aid of appellate jurisdiction, hereby stays the effect of this Order until 5:00 p.m. CDT on Tuesday, October 10, 2000, at which time it shall become effective, unless stayed or otherwise modified by the United States Sixth Circuit Court **[**91]** of Appeals. If it is not stayed by that day and time, the children are to arrive at Guadalajara airport by 10:00 p.m. on October 12, 2000.

It is so **ORDERED**.

ENTER this 4th day of October 2000.

ALETA A. TRAUGER
U.S. District Judge

APPENDIX C

00-6326/6551

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PERRY A. MARCH, IN HIS CAPACITY AS FATHER OF SAMSON LEO MARCH AND TZIPORA JOSETTE MARCH, BOTH MINOR CHILDREN, Petitioner-Appellee/Cross-Appellant,

v.

LAWRENCE E. LEVINE; CAROLYN R. LEVINE, Respondents-Appellants/Cross-Appellees.

Filed: July 9, 2001
DECISION WITHOUT PUBLISHED OPINION

BEFORE: KENNEDY and SUHRHEINRICH, Circuit Judges; and GAUGHAN, District Judge.*

ORDER

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

*Hon. Patricia A. Gaughan, United States District Judge for the Northern District of Ohio, sitting by designation.

APPENDIX D

STATUTORY PROVISIONS INVOLVED

1. Section 11601 of Title 42 of the United States Code provides:

Findings and declarations

(a) **Findings**. The Congress makes the following findings:

(1) The international abduction or wrongful retention of children is harmful to their well-being.

(2) Persons should not be permitted to obtain custody of children by virtue of their wrongful removal or retention.

(3) International abductions and retentions of children are increasing, and only concerted cooperation pursuant to an international agreement can effectively combat this problem.

(4) The Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980, establishes legal rights and procedures for the prompt return of children who have been wrongfully removed or retained, as well as for securing the exercise of visitation rights. Children who are wrongfully removed or retained within the meaning of the Convention are to be promptly returned unless one of the narrow exceptions set forth in the Convention applies. The Convention provides a sound treaty framework to help resolve the problem of international abduction and retention of children and will deter such wrongful removals and retentions.

(b) **Declarations**. The Congress makes the following declarations:

(1) It is the purpose of this Act to establish procedures for the implementation of the Convention in the United States.

(2) The provisions of this Act are in addition to and not in lieu of the provisions of the Convention.

(3) In enacting this Act the Congress recognizes--

(A) the international character of the Convention; and

(B) the need for uniform international interpretation of the Convention.

(4) The Convention and this Act empower courts in the United States to determine only rights under the Convention and not the merits of any underlying child custody claims.

2. Section 11602 of Title 42 of the United States Code provides:

Definitions

For the purposes of this Act--

(1) the term "applicant" means any person who, pursuant to the Convention, files an application with the United States Central Authority or a Central Authority of any other party to the Convention for the return of a child alleged to have been wrongfully removed or retained or for arrangements for organizing or securing the effective exercise of rights of access pursuant to the Convention;

(2) the term "Convention" means the Convention on the Civil Aspects of International Child Abduction, done at The Hague on October 25, 1980;

(3) the term "Parent Locator Service" means the service established by the Secretary of Health and Human Services under section 453 of the Social Security Act *(42 U.S.C. 653);*

(4) the term "petitioner" means any person who, in accordance with this Act, files a petition in court seeking relief under the Convention;

(5) the term "person" includes any individual, institution, or other legal entity or body;

(6) the term "respondent" means any person against whose interests a petition is filed in court, in accordance with this Act, which seeks relief under the Convention;

(7) the term "rights of access" means visitation rights;

(8) the term "State" means any of the several States, the District of Columbia, and any commonwealth, territory, or possession of the United States; and

(9) the term "United States Central Authority" means the agency of the Federal Government designated by the President under section 7(a) [*42 USCS § 11606*(a)].

3. Section 11603 of Title 42 of the United States Code provides:

Judicial remedies

(a) **Jurisdiction of the courts**. The courts of the States and the United States district courts shall have concurrent

original jurisdiction of actions arising under the Convention.

(b) **Petitions**. Any person seeking to initiate judicial proceedings under the Convention for the return of a child or for arrangements for organizing or securing the effective exercise of rights of access to a child may do so by commencing a civil action by filing a petition for the relief sought in any court which has jurisdiction of such action and which is authorized to exercise its jurisdiction in the place where the child is located at the time the petition is filed.

(c) **Notice**. Notice of an action brought under subsection (b) shall be given in accordance with the applicable law governing notice in interstate child custody proceedings.

(d) **Determination of case**. The court in which an action is brought under subsection (b) shall decide the case in accordance with the Convention.

(e) **Burdens of proof**.

(1) A petitioner in an action brought under subsection (b) shall establish by a preponderance of the evidence--

(A) in the case of an action for the return of a child, that the child has been wrongfully removed or retained within the meaning of the Convention; and

(B) in the case of an action for arrangements for organizing or securing the effective exercise of rights of access, that the petitioner has such rights.

(2) In the case of an action for the return of a child, a respondent who opposes the return of the child has the burden of establishing--

(A) by clear and convincing evidence that one of the exceptions set forth in article 13b or 20 of the Convention applies; and

(B) by a preponderance of the evidence that any other exception set forth in article 12 or 13 of the Convention applies.

(f) **Application of the Convention**. For purposes of any action brought under this Act--

(1) the term "authorities", as used in article 15 of the Convention to refer to the authorities of the state of the habitual residence of a child, includes courts and appropriate government agencies;

(2) the terms "wrongful removal or retention" and "wrongfully removed or retained", as used in the Convention, include a removal or retention of a child before the entry of a custody order regarding that child; and

(3) the term "commencement of proceedings", as used in article 12 of the Convention, means, with respect to the return of a child located in the United States, the filing of a petition in accordance with subsection (b) of this section.

(g) **Full faith and credit**. Full faith and credit shall be accorded by the courts of the States and the courts of the United States to the judgment of any other such court ordering or denying the return of a child, pursuant to the Convention, in an action brought under this Act.

(h) **Remedies under the Convention not exclusive.** The remedies established by the Convention and this Act shall be in addition to remedies available under other laws or international agreement.

APPENDIX E

TREATY PROVISIONS INVOLVED

The Hague Convention on the Civil Aspects of International Child Abduction provides in pertinent part:

CHAPTER I – SCOPE OF THE CONVENTION

Article 1

The objects of the present Convention are –

a. to secure the prompt return of children wrongfully removed to or retained in any Contracting State; and

b. to ensure that rights of custody and of access under the law of one Contracting State are effectively respected in other Contracting States.

Article 2

Contracting States shall take all appropriate measures to secure within their territories the implementation of the objects of the Convention. For this purpose they shall use the most expeditious procedures available.

Article 3

The removal or the retention of a child is to be considered wrongful where –

a. it is in breach of rights of custody attributed to a person, an institution or any other body, either jointly or alone, under the law of the State in which the child was habitually resident immediately before the removal or retention; and

b. at the time of removal or retention those rights where actually exercised, either jointly or alone, or would have been so exercised but for the removal or retention.

The rights of custody mentioned in sub-paragraph a above may arise in particular by operation of law or by reason of a judicial or administrative decision, or by reason of an agreement having legal effect under the law of that State.

Article 4

The Convention shall apply to any child who was habitually resident in a Contracting State immediately before any breach of custody or access rights.

The Convention shall cease to apply when the child attains the age of 16 years.

Article 5

For the purposes of this Convention –

a. 'rights of custody' shall include rights relating to the care of the person of the child and, in particular, the right to determine the child's place of residence;

b. 'right of access' shall include the right to take a child for a limited period of time to a place other than the child's habitual residence.

CHAPTER II – CENTRAL AUTHORITIES

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Article 7

Central Authorities shall co-operate with each other and promote co-operation amongst the competent

authorities in their respective States to secure the prompt return of children and to achieve the other objects of this Convention.

In particular, either directly or through any intermediary, they shall take all appropriate measures –

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CHAPTER III – RETURN OF CHILDREN

Article 8

Any person, institution or other body claiming that a child has been removed or retained in breach of custody rights may apply either to the Central Authority of the child's habitual residence or to the Central Authority of any other Contracting State for assistance in securing the return of the child.

The application shall contain –

a. information concerning the identity of the applicant, of the child and of the person alleged to have removed or retained the child;

b. where available, the date of birth of the child;

c. the grounds on which the applicant's claim for return of the child is based;

d. all available information relating to the whereabouts of the child and the identity of the person with whom the child is presumed to be.

The application may be accompanied or supplemented by –

e. an authenticated copy of any relevant decision or agreement;

f. a certificate or an affidavit emanating from a Central Authority, or other competent authority of the State of the child's habitual residence, or from a qualified person, concerning the relevant law of that State;

g. any other relevant document.

Article 9

If the Central Authority which receives an application referred to in Article 8 has reason to believe that the child is in another the child, it shall directly and without delay transmit the application to the Central Authority of that Contracting State and inform the requesting Central Authority, or the applicant, as the case may be.

Article 10

The Central Authority of the State where the child shall take or cause to be taken all appropriate measures in order to obtain the voluntary return of the child.

Article 11

The judicial or administrative authorities of Contracting States shall act expeditiously in proceedings for the return of children.

If the judicial or administrative authority concerned has not reached a decision within six weeks from the date of commencement of the proceedings, the applicant or the Central Authority of the requested State, on its own initiative or if asked by the Central Authority of the requesting State, shall have the right to request the Central Authority of the requested State, that Authority shall

transmit the reply to the Central Authority of the requesting State, or to the applicant, as the case may be.

Article 12

Where a child has been wrongfully removed or retained in terms of Article 3 and, at the date of the commencement of the proceedings before the judicial or administrative authority of the Contracting State where the child is, a period of less than one year has elapsed from the date of the wrongful removal or retention, the authority concerned shall order the return of the child forthwith.

The judicial or administrative authority, even where the proceedings have been commenced after the expiration of the period of one year referred to in the preceding paragraph, shall also order the return of the child, unless it is demonstrated that the child is now settled in its new environment.

Where the judicial or administrative authority in the requested State has reason to believe that the child has been taken to another State, it may stay the proceedings or dismiss the application for the return of the child.

Article 13

Notwithstanding the provisions of the preceding Article, the judicial or administrative authority of the requested State is not bound to order the return of the child if the person, institution or other body which opposes its return establishes that –

a. the person, institution or other body having the care of the person of the child was not actually exercising the custody rights at the time of removal or retention, or had consented to or

subsequently acquiesced in the removal of retention; or

b. there is a grave risk that his or her return would expose the child to physical or psychological harm or otherwise place the child in an intolerable situation.

The judicial or administrative authority may also refuse to order the return of the child if it finds that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to take account of its views.

In considering the circumstances referred to in this Article, the judicial or administrative authorities shall take into account the information relating to the social background of the child provided by the Central Authority or other competent authority of the child's habitual residence.

Article 14

In ascertaining whether there has been a wrongful removal of retention within the meaning of Article 3, the judicial or administrative authorities of the requested State may take notice directly of the law of, and of judicial or administrative decisions, formally recognized or not in the State of the habitual residence of the child, without recourse to the specific procedures for the proof of that law or for the recognition of foreign decisions which would otherwise be applicable.

Article 15

The judicial or administrative authorities of a Contracting State may, prior to the making of an order for

the return of the child, request that the applicant obtain from the authorities of the State of the habitual residence of the child a decision or other determination that the removal or retention was wrongful within the meaning of Article 3 of the Convention, where such a decision or determination may be obtained in that State. The Central Authorities of the Contracting States shall so far as practicable assist applicants to obtain such a decision or determination.

Article 16

After receiving notice of a wrongful removal or retention of a child in the sense of Article 3, the judicial or administrative authorities of the Contracting State to which the child has been removed or in which it has been retained shall not decide on the merits of rights of custody until it has been determined that the child is not to be returned under this Convention or unless an application under the Convention is not lodged within a reasonable time following receipt of the notice.

Article 17

The sole fact that a decision relating to custody has been given in or is entitled to recognition in the requested State shall not be a ground for refusing to return a child under this Convention, but the judicial or administrative authorities of the requested State may take account of the reasons for that decision in applying this Convention.

Article 18

The provisions of this Chapter do not limit the power of a judicial or administrative authority to order the return of the child at any time.

Article 19

A decision under this Convention concerning the return of the child shall not be taken to be determination on the merits of any custody issue.

Article 20

The return of the child under the provision of Article 12 may be refused if this would not be permitted by the fundamental principles of the requested State relating to the protection of human rights and fundamental freedoms.